TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted]

No. [redacted] 158

SEWARD E. LOWE AND SUSAN LOWE, PETITIONERS,

vs.

ALEXANDER DENISON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF [redacted]

(31,303)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 580

SEWARD K. LOWE AND SUSAN LOWE, PETITIONERS,

vs.

ALEXANDER J. DICKSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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[fols. 1a-29] **IN DISTRICT COURT OF BEAVER COUNTY, OKLAHOMA**

No. 1991

ALEXANDER J. DICKSON, Plaintiff,

vs.

SEWARD K. LOWE and SUSAN LOWE, Defendants

SECOND AMENDED AND SUPPLEMENTAL PETITION—Filed July 31, 1919

Comes now the plaintiff, by leave of the Court having been first had and received, and files this, his second amended and supplemental petition, and for his cause of action, alleges:

That the defendants, Seward K. Lowe and Susan Lowe, are now and were at all the times herein mentioned, husband and wife; that the defendant, Susan Lowe, has no right or claim in the lands involved in this suit, except as the wife of Seward K. Lowe.

Plaintiff is a native born citizen of the United States and was at all times herein mentioned and set out over Twenty-one years of age and the head of a family and resided with his said family, in Beaver County, Oklahoma; and on, from and since the 2nd day of July, 1906, was fully, duly and legally qualified to make entry of the public land of the United States subject to Homestead Entry under the Homestead Laws of the United States; that the plaintiff is the equitable owner and entitled to the immediate possession of

The Southwest Quarter (S. W. ¼) of the Southeast Quarter (S. E. ¼) and the South Half (S. ½) of the Southwest Quarter (S. W. ¼) of Section Fifteen (15) and the Northwest Quarter (N. W. ¼) of the Northeast (N. E. ¼) of Section Twenty-two (22), all in Township Five (5) North of Range Twenty-eight (28), E. C. M. Beaver County, Oklahoma.

And plaintiff further alleges that the defendant, Seward K. Lowe, is in possession of said land and wrongfully and unlawfully and without right, withholds the possession of all of said land from this [fol. 30] plaintiff, and keeps plaintiff out of possession of said land to the plaintiff's damage for withholding the use and possession thereof in the sum of One Hundred Fifty Dollars ($150) per annum, and the plaintiff is entitled to recover said land and the possession thereof and the rents and profits of said land.

And plaintiff further alleges that the defendant, Susan Lowe, the wife of Seward K. Lowe, is also in possession of said land, as the wife of Seward K. Lowe, and wrongfully and unlawfully and without right, assists the said defendant, Seward K. Lowe in withholding possession thereof from this plaintiff to plaintiff's damage in the

sum of One Hundred and Fifty Dollars ($150) per annum, and that said withholding of possession of said land by both of said defendants, has existed for three years last past.

Plaintiff further alleges that on the 2nd day of July, 1906, the said tract of land was public land of the United States, subject to Homestead Entry under the laws of the United States, and was unappropriated public land without and legal entry thereon and that the plaintiff being fully qualified to make homestead entry on said land did make and present to the Register and Receiver of the United States land office at Woodward, Oklahoma, in which land district the said tract of land was then located and subject to entry his homestead application therefor to make homestead entry under the homestead laws of the United States on said land and did tender to the Register and Receiver of said land office the said application papers, the fee and commission required by law to be paid therefor, and that the said Register and Receiver, instead of accepting said application for entry on said land so presented and tendered, did wrongfully and erroneously reject and refuse said application, solely [fol. 31] for the reason that the said land was covered and segregated by the Homestead Entry of Alexander J. Dickson, this plaintiff, made on said land on the 3rd day of March, 1902, the same being Homestead Entry No. 11,185 of the United States Land Office at Woodward, Oklahoma, and this plaintiff alleges that said action, ruling and order of the said Register and Receiver of the said Land Office at Woodward, Oklahoma was erroneous and contrary to law, for the reason that said Entry No. 11,185 was null and void and that the invalidity of said Entry No. 11,185 appeared upon the face of the entry papers and upon the face of the record required by law to be made and kept by the Register and Receiver of said land office.

That on the 22nd day of May, 1894, this plaintiff, being fully qualified so to do, made Homestead Entry No. 509, at said United States Land Office, at Woodward, Oklahoma, for the West Half (W. ½) of the Southwest Quarter (S. W. ¼) and the West Half (W. ½) of the Northwest Quarter (N. W. ¼) of Section Fifteen (15) Township Twenty-eight (28) North of Range Twenty-five West (25 W.) of the Indian Meridian in Woodward County, Oklahoma, at the United States Land Office at Woodward, Oklahoma, in which land district said land was situated; and on the 28th day of May, 1899, he made Five-year Final Proof upon said Homestead under said Entry, and received Final Certificate No. 509 therefor, which was issued to him by the Register and Receiver of said Land Office, the plaintiff paying the purchase price required by law of One Dollar Per acre therefor, and that Patent was issued to said plaintiff for said tract of land on April 21st, 1900; and that by reason of such facts, this plaintiff was, on the 3rd day of March, 1902, disqualified to make Homestead Entry on the tract of land first herein described.

That on the 27th day of February, 1902, this plaintiff executed [fol. 32] Homestead Application to enter the land herein first above described and Homestead Affidavit required by the laws of the United States, and the rules and regulations of the Interior Depart-

ment, before Charles O. Tannehill, Probate Judge of Beaver County, Oklahoma, and caused the same to be forwarded to the United States Land Office at Woodward, Oklahoma. A copy of said application is hereto attached and marked "Exhibit A," and a copy of said affidavit is hereto attached and marked "Exhibit B," and each is made a part of this petition.

That said Application and Homestead Affidavit were received by said United States Land Office at Woodward, Oklahoma, on the 3rd day of March, 1902.

That under the laws of the United States and regulations of the Interior Department, the plaintiff was required to set out in said Affidavit the facts in relation to any formal Homestead Entry by him made; that it was set out in said Affidavit that Plaintiff had theretofore made Homestead Entry No. 509, May 22, 1894 for the lands herein last above described; that he made Final Proof thereon, December 28, 1899, and that Patent issued April 23, 1900 on said Homestead Proof.

That on said 3rd day of March, 1902, the said Register and Receiver of the United States Land Office at Woodward, Oklahoma received and filed said Homestead Application and affidavit, and at the same time, to-wit: March 3, 1902, made and entered on Contest Docket No. 4, at page 142 thereof, at said United States Land Office at Woodward, Oklahoma, an entry setting out that said Entry was erroneously allowed, for the reason that the Plaintiff had made five-year proof on a former Entry No. 509, filed May 22, 1899, and on the 6th day of March, made an entry on said Docket at the same page, reciting notices to this plaintiff; and on the 13th day of March, [fol. 33] 1902, made an entry upon the same docket, reciting return receipt of such notices.

A copy of Page 142 of Contest Docket No. 4 of the United States Land Office at Woodward, Oklahoma, is hereto attached, marked "Exhibit C," and made a part of this Petition.

That said Contest Docket was at all the times herein mentioned, a book required by the law to be kept by the Register and Receiver of said Land Office, in which was entered erroneous, void and rejected Homestead Entries.

That in attempting to make Entry No. 11,185, the plaintiff acted in good faith and in reliance upon the advice of the said Charles O. Tannehill, believing at the time that his right to make second Homestead Entry had been restored by the law.

That on the 13th day of March, 1902, he received the following notice signed by the Register of the United States Land Office at Woodward, Oklahoma:

"March 3rd, 1902. This office received through Charles O. Tannehill, Probate Judge, Beaver, O. T., your application to make homestead entry for the S. W. ¼ S. E. ¼, S. ½ S. W. ¼ Sec. 15, and the N. W. ¼ N. E. ¼ Sec. 22 T. 5., R. 28, E. C. M.

"In your homestead affidavit (Blank 4-063) made in support of your application, you allege that you paid out on it about three years ago after giving the description of a former tract entered by you.

"Upon examination of the record of Cash Sales, it so appeared, and your entry was allowed. But on further examination of the records it was found that while you paid the legal price for the land that you in reality made a five year proof under Sec. 2291 of the Revised Statutes, that Final Receipt No. 543, dated December 23, 1899, was issued for your proof and at the same time Cash Receipt was issued for the payment of the money and interest due on the land.

"This office finds that your entry was erroneously allowed because when you made your final proof you exhausted your homestead right and that at this time it has not been restored by law; therefore, this notice, and you are further notified that the Hon. Commissioner of the General Land Office will undoubtedly hold your entry for cancellation on account of its illegality. If you wish you can relinquish your entry No. 11,185 and make application for the return of your fees and commissions."

[fol. 34] That this plaintiff took no action whatever, under said notice and the lands herein first above described remained open for application thereof by any qualified entryman until the 2nd day of July, 1906, when, as aforesaid, this plaintiff made the first legal application to make entry of said lands which was wrongfully rejected, as aforesaid.

That this plaintiff is unable to get out in this Petition a copy of his application and Homestead Affidavit so tendered to the Register and Receiver of the said Land Office, July 2nd, 1906, for the reason that he has neither the copies nor the originals in his possession. That he has applied for copies thereof to the General Land Office, Washington, D. C., and tendered the price thereof, but up to this time, has been unable to receive the same; but the plaintiff alleges that said application, so made July 2nd, 1906, and the Homestead Affidavit of said date, and filing papers in connection with said application, were in due form and made and prepared upon the blanks and forms approved by said Land Office, and were rejected solely upon the grounds that said application was in conflict with said homestead entry No. 11,185.

That this plaintiff is unable to set out in this Petition a copy of law and the regulations of the Interior Department to be executed and filed by Applicants to make Homestead Entry, this plaintiff made and tendered at the same time to said Register and Receiver, his supplemental affidavit, reciting the facts upon which he applied to make such entry on said July 2, 1906, a copy of which affidavit is hereto attached, marked "Exhibit D" and made a part hereof.

Plaintiff further says that on the said 2nd day of July, 1906, he was fully qualified to make Homestead Entry for said lands, for that on the 22nd day of May, 1902 the Congress of the United States [fol. 35] passed an act which was approved by the President of the United States (U. S. Statute at Large, Vol. —, Page —) which act removed Plaintiff's disqualification to make Homestead Entry on account of his having made said prior Entry of May 2, 1894 for

the lands herein last above described, and being so duly qualified by said act of Congress of May 22, 1902, the plaintiff's said application to make Entry of the lands herein sued for, on the 2nd day of July, 1906, and which he alleges was presented to the Register and Receiver of the United States Land Office at Woodward, Oklahoma, was in due form and with fees and commissions therefor was improperly, erroneously and unlawfully rejected on the said July 2, 1906, and the plaintiff alleges that he duly and legally appealed from said erroneous action to the Commission of the General Land Office at Washington, D. C., and upon consideration of said appeal said ruling of said Register and Receiver of said Land Office, in rejecting this plaintiff's application, was in all things affirmed, a copy of which decision of said Commissioner is hereto attached and marked "Exhibit E" and made a part of this petition.

Thereupon, this plaintiff duly and legally appealed from said decision of said Commissioner of the United States Land Office to the Secretary of the Interior, and that on the 13th day of February, 1908, the Secretary of the Interior in all things affirmed the decision of the Register and Receiver and Commissioner of the Land Office hereinbefore referred to, a copy of which decision is hereto attached and marked "Exhibit F," and made a part of this Petition.

That in and by said decision of February 13, 1908, the said Secretary of the Interior the said department finally decided this plaintiff's claim and application to make such entry on July 2, 1906, adverse to this plaintiff.

That afterwards and on the 8th day of September, 1908, a re-[fol. 36] hearing was granted in said cause by the said Secretary of the Interior. A copy of said order is hereto attached and marked "Exhibit G" and made a part of this petition.

That afterwards a re-hearing was had in such cause before the Register and Receiver of the United States Land Office upon the original affidavit of contest, charging this plaintiff with abandoning the tract of land embraced in said Homestead Entry No. 11,185, and upon such hearing the Register and Receiver of said Land Office, by their decision recommended the cancellation of said Entry upon the grounds of abandonment and upon no other grounds, a copy of which said decision of the Register and Receiver is hereto attached, marked "Exhibit H" and made a part of this petition.

That this plaintiff duly and legally appealed from said decision of the Commissioner of the General Land Office at Washington, D. C., and upon consideration of said appeal, the Decision of the Register and Receiver was in all things affirmed a copy of which said decision is hereto attached, marked "Exhibit I" and made a part hereof.

That thereupon this plaintiff duly and legally appealed from the decision of the said Commissioner of the said Land Office to the Secretary of the Interior, and upon consideration thereof, said decision of the Commissioner of the General Land Office was in all things affirmed, a copy of which said decision is hereto attached, marked "Exhibit J" and made a part of this petition.

That on the 28th day of January, 1905, the Defendant, Seward K. Lowe, filed in the United States Land Office at Woodward, Okla-

homa, a pretended affidavit of contest against this plaintiff, charging that this plaintiff had wholly abandoned said entry, No. 11185 for [fol. 37] more than six months, and failure to improve and cultivate the land embraced in said entry as required by law.

That the Register and Receiver of the United States Land Office at Woodward, Oklahoma, erroneously and unlawfully entertained said pretended contest and upon a hearing thereof, recommended *said pretended contest and upon a hearing thereof, recommended* that said entry No. 11185 be cancelled, upon the grounds of abandonment and failure to cultivate, and upon no other grounds, whatever, a copy of which said decision of the Register and Receiver is hereto attached, marked "Exhibit K" and made a part of this petition.

That the plaintiff duly and legally appealed from said decision of the Register and Receiver to the Commissioner of the General Land Office at Washington, D. C., and upon consideration thereof said decision of the Register and Receiver was in all things affirmed, as shown by "Exhibit E." hereinabove referred to.

That thereupon this plaintiff duly appealed from said decision of the Commissioner of the United States Land Office to the Secretary of the Interior and that upon consideration of said appeal, the decision of the Commissioner of the United States Land Office was in all things affirmed by said Secretary of the Interior, as more fully appears by "Exhibit F." hereinabove referred to.

That all of said rulings and orders of said Tribunals of the Land Department of the United States were erroneously and were a misapplication of the law to the undisputed facts constituting plaintiff's right to enter said tract of land, as herein described, because the plaintiff's application to make entry therefor, on March 3, 1902, was null and void, for the reason that on said date, as shown by the [fol. 38] facts herein alleged and by the entry papers and by the record hereinbefore referred to, he was not entitled to make a second Homestead Entry until after the passage of the Act of Congress of May 22nd, 1902, hereinabove referred to.

That said entry of March 3, was suspended and rejected by the action and order of the Register and Receiver made at the time said application to enter was filed in said Land Office, to-wit: March 3, 1902, by entering upon said Contest Docket No. 4, at page 142 thereof, the order and finding of said Register and Receiver.

That said entry was erroneous, and said entry was never relieved of such suspension and rejection, and was at all times illegal and void; and that the illegality of said entry No. 11185 at all times appeared upon the face of the record of the said United States Land Office at Woodward, Oklahoma, and upon the entry papers, themselves, and said defendant, at all times knew, or could have known, from the record of said entry No. 11185, that the same was void, without and resort to extraneous evidence, whatever.

That in all of the action of said Land Department in refusing to permit this plaintiff to make his said entry on said land herein sued for under his application of July 2nd, 1906, therefor, and in the entertaining and support and allowance of said contest of Seward

K. Lowe of said illegal entry Number 11185, made by this plaintiff on said land on the 3rd day of March, 1902, and in awarding of the said Seward K. Lowe of a preference right to enter said tract of land under his said illegal contest, the said land department, the Register and Receiver of the United States Land Office at Woodward, Oklahoma, the Commissioner of the General Land Office and the Secretary of the Interior erred in pure and distinct matter of law unassoci-
[fol. 39] ated with any error or dispute of facts, in this, to-wit: That whereas, the plaintiff was legally entitled to enter said tract of land under his said application of July 2nd, 1906, and was the first legal applicant to make entry thereof, and the said Seward K. Lowe was not entitled to contest the said illegal entry on said land of March 3rd, 1902, which was immediately suspended and rejected and was therefore not an entry of said land, and whereas, the said Seward K. Lowe was under said illegal contest of said entry, awarded the preference right to enter said land, he was not entitled to make said contest or to make said entry, and was not the first legal applicant for said land, and plaintiff alleges that he, at all times, exercised every right which he was given and which was awarded him under the laws of the United States to correct said errors and erroneous rulings in the Land Department of the United States, but the same were constantly denied him through said errors of law applied by the Land Department to said case, and by which, and because of which only, that is, said errors of law applied in said rulings, orders and decisions of the Land Department of the United States as applied to the undisputed facts thereof, this plaintiff has been denied his right so applied for to make entry and receive final certificate and patent to said land for which he now sues under the Homestead Laws of the United States.

Plaintiff further alleges that under and being permitted by said erroneous rulings of the Land Department of the United States, and with full knowledge of all the facts herein stated, the defendant, Seward K. Lowe, did on the 6th day of August, 1910, make Homestead entry No. 021188 for the said lands herein involved, to-wit:

"The Southwest Quarter (S. W. ¼) of the Southeast Quarter (S. E. ¼) and the South Half (S. ½) of the Southwest Quarter (S. W. ¼) of Section Fifteen (15) and the Northwest Quarter (N. W. ¼) of the Northeast Quarter (N. E. ¼) of Section Twenty-two (22) all in Township Five (5) North of Range Twenty-eight (28) E. C. M., Beaver County, Oklahoma."

[fol. 40] Herein first above described at the United States Land office at Woodward, Oklahoma, and, over the protest and objection of this plaintiff, the defendant, Seward K. Lowe, made his final proof under said entry and on the 19th day of July, 1917, received a final certificate to and for said land, which was issued to him on July 19th, 1917, and by such certificate the equitable title to said land and the equitable right thereto, as between him and the United

States Government, passed out of said United States to said Seward K. Lowe, and,

That subsequent thereto and on or about the 13th day of April, 1918, the Government of the United States, in the name of the President thereof, as provided by law and in accordance with the custom and practice in such cases, did issue and deliver to the defendant, Seward K. Lowe, its Patent in due form to said tract of land last above described and herein involved, was patented, conveyed and transferred by the United States Government to the said Seward K. Lowe and said Patent was received and accepted by the said Seward K. Lowe and said Patent was received and accepted by the said Seward K. Lowe, a copy of said Patent is hereto attached, marked "Exhibit L" and made a part of this petition; and the same is recorded in the office of the County Clerk of Beaver County, Oklahoma, in Book 44 at page 104.

And plaintiff further alleges that the said title and right which the defendant, Seward K. Lowe, holds in and to said described tract of land herein final certificate and said Patent is vested in the defendant, Seward K. Lowe, as trustee for this plaintiff, and that he holds the same as the resulting trustee for this plaintiff and that the plaintiff is entitled to have a resulting trustee declared and a decree of the Court holding the said Seward K. Lowe is trustee for this plaintiff, holding the titles to said lands first and last herein de-
[fol. 41] scribed, and for which the plaintiff herein sues, for this plaintiff.

Plaintiff further alleges that he resided upon, cultivated and improved the said tract of land herein first described and for which he now sues and improved the same in all respects in full compliance with the laws of the United States, entitling him to make homestead entry thereof from and after the 2nd day of July, 1903, and until the first day of May, 1917, and that he has been deprived of his right to enter said lands under his prior application therefor, and his residence, cultivation and improvement and tender of all commissions and fees for entry of said land, by and wholly on account of said erroneous ruling and adjudications, made in connection therewith by the Register and Receiver of said Land Office at Woodward, Oklahoma, the Commissioner of the General Land Office and the Secretary of the Interior, and wholly upon their misapplication and misconstruction of the laws of the United States as applied to Plaintiff's said application to make Homestead Entry of said lands and by reason of the facts above stated this plaintiff is the equitable owner of said lands and entitled to a decree therefor, and that but for said erroneous rulings of the different branches of the Land Department of the United States and their misapplication and misconstruction of the laws of the United States upon and concerning the plaintiff's application to make entry of said lands and the various said rulings and decisions incident thereto, this plaintiff would have been awarded the right to enter said land and would have received final certificate and Patent for said land.

Wherefore, plaintiff prays that the defendant, Seward K. Lowe, be decreed to be a trustee holding the title to said land, to-wit:

[fol. 42] "The Southwest Quarter (S. W. ¼) of the Southeast Quarter (S. E. ¼) and the South Half (S. ½) of the Southwest Quarter (S. W. ¼) of Section Fifteen (15) and the Northwest Quarter of the Northeast Quarter (N. E. ¼) of Section Twenty-two (22) all in Township Five (5) North, of Range Twenty-eight (28) E. C. M., Beaver County, Oklahoma."

for the use and benefit of this plaintiff and as resulting trustee for the plaintiff and that the Court by its proper decree will require and compel the defendant, Seward K. Lowe, to convey said lands by a good and sufficient deed of conveyance to the plaintiff, and that the defendant, Seward K. Lowe, herein be divested of all right, title and interest to said lands and that this plaintiff be vested with the full and complete title thereto and the possession thereof and that the plaintiff recover from the defendants Seward K. Lowe and Susan Lowe the rents and profits of said land and the value of the use and possession thereof from and after the 17th day of July, 1917, and that the defendant, Susan Lowe, as the wife of said Seward K. Lowe, be decreed to have no right, title or interest in or to said lands or any part thereof and be barred from claiming or asserting any right thereto or therein, and that this plaintiff recover all of the just, legal and equitable relief, and the costs hereof.

Dickson & Dickson, Attorneys for Plaintiff.

[fol. 43] EXHIBIT "A" TO SECOND AMENDED AND SUPPLEMENTAL PETITION

831757—2

Homestead. Application No. 11185

Land Office at Woodward, Oklahoma

February 27, 1902.

I, Alexander J. Dickson, at Gate, O. T., do hereby apply to enter under Section 2289, Revised Statutes of the United States, the S. W. ¼, S. E. ¼ & S. ½, S. W. ¼ Sec. 15 & N. W. ¼, N. E. ¼ of Section 22, in Township 5 N. of Range 28 E. C. M., containing 160 acres.

Alexander J. Dickson.

Land Office at Woodward, O. T.

March 3, 1902.

I, F. D. Healy, Register of the Land Office, do hereby certify that the above application is for Surveyed Lands of the class which

the applicant is legally entitled to enter under Section 2289, Revised Statutes of the United States, and that there is no prior valid adverse right to the same.

F. D. Healy, Register

[fol. 44] EXHIBIT "B" TO SECOND AMENDED AND SUPPLEMENTAL PETITION

831757—1

Homestead Affidavit

Department of the Interior, United States Land Office

Beaver, Oklahoma, February 27, 1902.

I, Alexander J. Dickson, of Gate, O. T. having filed my application No. —, for the entry under Section 2289, Revised Statutes of the United States, do solemnly swear that I am not the proprietor of one hundred and sixty acres of land in any State or Territory; that I am Native born Citizen of United States and head of a family that my said application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons or corporation, and that I will faithfully and honestly endeavor to comply with all the requirements of the law, residence and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation or syndicate in making such entry, nor in collusion with any person, corporation or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make any agreement, or contract in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which I might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except myself, and further, that since August 30, 1890, I have not [fol. 45] entered under the land laws of the United States, or filed upon, a quantity of land, agricultural in character, and not mineral, which with the tracts now applied for, would make more than three hundred and twenty acres.

That the local land office being more than 50 miles away I am unable to appear there at this time and that I have not heretofore made an entry under the homestead laws, except I filed W. ½ N. W. ¼ & S. W. ¼ Sec. 15 being 3 miles from West and eight miles from the north line of Woodward County and paid out on it about three years ago.

(Sign plainly with full Christian name.)

Alexander J. Dickson.

Sworn to and subscribed before me this 27 day of February, 1902, at my office at Beaver in Beaver County, O. T. Charles O. Tannehill, Probate Judge.

Here insert statement that affiant is a citizen of the United States, or that he has filed his declaration of intention to become such, and that he is the head of a family, or is over twenty-one years of age, as the case may be. It should be stated whether applicant is native born or not, and if not, a certified copy of his certificate of naturalization, or declaration of intention, as the case may be, must be furnished. (See page 45, circular of January 1, 1899.)

H. E. #509 made May 22, 1894, W. ½ S. W. ¼ and W. ½ N. W. ¼ Sec. 15 T. 28, R. 25 W. Final proof Dec. 28, 1899. Patented Apr. 21, 1900.

[fol. 46] EXHIBIT "C" TO SECOND AMENDMENT AND SUPPLEMENTAL PETITION

142

Contest Docket No. 4

Erroneous Entry: H. E. #11185.

Part of section	Sec.	T.	R.	Name of party
S. W. ¼, S. E. ¼	15	5	28E	Andrew J. Dickson
N. W. ¼, N. E. ¼	22	"	"	

(Double page)

Date of Entry: Mar. 3, 1902.

Remarks:

Erroneously allowed in that he made a five year proof on a former entry H. E. #509 filed May 22, 1894, F. C., issued Dec. 28, 1899.

Mar. 6, 1902.—Notified by Reg. mail, that the Hon. Comr. will doubtless hold that the entry H. E. No. #11185 for cancellation and that he has a right to relinquish and make application for the return of his fees and commissions.

Mar. 13, 1902.—Return receipt shows notice received Mar. 11, 1902.

[fol. 47] EXHIBIT "D" TO SECOND AMENDED AND SUPPLEMENTAL PETITION

United States Land Office, Woodward, Oklahoma

July 2, 1906.

Alexander J. Dickson, of lawful age being first duly sworn, according to law, upon his oath, deposes and says:

That on the 22nd day of May, 1894, he made homestead entry #509 for the W. ½ S. W. ¼ and the W. ½ N. W. ¼ of section 15, Township 28 North of Range 25 in Woodward County, Oklahoma Territory, at the United States land office at Woodward, Oklahoma, and on the — day of —— he perfected said entry by making final proof at said land office; that he had resided continuously on and cultivated and improved said lands for a period of five years and paid the price provided for by the law opening said lands for settlement and received from said Land Office his final certificate therefor on the 29th day of Dec. 1899.

That on or about the 3rd day of March, 1902, being desirous of making an additional Homestead entry for the S. W. ¼ of the S. E. ¼ and the S. ½ S. W. ¼ of section 15, also N. W. ¼ N. E. ¼ of Section 22, Township 5 North of range 28 E. C. M. in Beaver County, Oklahoma, he employed one, C. O. Tannehill, Probate Judge of Beaver County, Oklahoma Territory, and as affiant was informed and believed authorized to practice be[illegible]e said Land Office to draw the necessary applications and affidavits for such homestead entry and paid him a good and valid consideration therefor, to-wit, $5.00; that affiant fully stated to said C. O. Tannehill all the facts in relation to his former homestead entry #509; that said C. O. Tannehill thereupon drew said affidavits and application to make H. E. for the lands last above described and affiant made affidavit to and executed the same on said last mentioned date and caused them, together with the fees of the Register & Receiver, to be transmitted to the U. S. Land Office at Woodward, Oklahoma [fol. 48] Territory.

That on the 3rd day of March, 1902, said application and affidavits were received by the Register & Receiver of said Land Office and by them approved and on the same day said Register & Receiver caused to be recorded in the Tract Book of said office an entry showing that said entry was allowed under the number and style of Homestead Entry #11185.

That on the 11th day of March, 1902, said Register & Receiver caused a notice to be served on affiant stating that the Honorable Commissioner of the General Land Office will doubtless hold said homestead entry #11185 for cancellation for the reason that this affiant had made a five year proof on his former homestead entry #509, filed May 22, 1894, on which final certificate was issued on the 28th day of December, 1899, and a record of said notice was duly entered in Vol. 4 of the Appeal Docket of said Land Office at page 142 on the 13th day of March, 1902.

That on the 27th day of June, 1906, this affiant employed attorneys to investigate the condition of said homestead entry #11185 and he was advised by them that said entry was void on account of the facts above stated; and that by the Act of May 22, 1902, he is entitled to make an additional homestead entry.

That no person other than this affiant has ever settled upon, or improved any portion of said tract of land embraced in said homestead entry; that this affiant is now and for several years last past

has been living continuously upon said tract of land and has placed valuable and lasting improvements thereon.

Alexander J. Dickson.

Subscribed and sworn to before me this 2 day of July, 1906.
Dick T. Morgan, Register.

[fol. 49] EXHIBIT "E" TO SECOND AMENDED AND SUPPLEMENTAL PETITION

Doc. 12, Case 17029

Department of the Interior, General Land Office

H. E. No. 11185

SEWARD K. LOW

v.

ALEXANDER J. DICKSON, Gate, Oklahoma

Cancellation. Affirmed

Washington, D. C., July 8th, 1907.

Register and Receiver, Woodward, Oklahoma.

SIRS: On May 22, 1894, Alexander J. Dickson made H. E. No. 509 for the W. ½, S. W. ¼ and W. ½, N. W. ¼, Sec. 15, T. 28 N., R. 25 W. *0*. On December 28, 1899, he made final proof and payment for the land, and on the same day cash receipt and final receipt were issued to him. Patent was issued on April 24, 1900.

On February 27, 1902, Dickson executed his application to make homestead entry for the S. W. ¼, S. E. ¼ and S. ½, S. W. ¼ Sec. 15, and the N. W. ¼, N E. ¼, Sec. 22 T. 5 N., R. 28 E., C. M. He did not fully describe the land covered by his original entry, and he stated in his homestead affidavit that he had "paid out on it about three years ago." His application was allowed as H. E. No. 11185 on March 3, 1902.

On March 6, 1902, the register of your office wrote him the following letter which was received by him on March 11, 1902:

March 3, 1902, this office received through Charles O. Tannehill, Pro' ate Judge, Beaver, O. T., your application to make homestead entry for the S. W. ¼, S. E. ¼, S. ½, S. W. ¼, Sec. 15, and the N. W. ¼, N. E. ¼, Sec. 22, T. 5 N., R. 28 E., C. M.

In your homestead affidavit (Blank 4-063) made in support of your application, you allege that "you paid out on it about three years ago" after giving the description of a former tract entered by you.

Upon examination of the record of Cash Sales it so appeared, and your entry was allowed. But on further examination of the records it was found that while you paid the legal price for the land that you in reality made a five-year proof under Sec. 2291 of the Revised Statutes, that Final Receipt No. 543, dated December 28, 1899 was issued for your proof and at the same time Cash Receipt was issued [fol. 50] for the payment of the money and interest due on the land.

This office finds that your entry was erroneously allowed because when you made your final proof you exhausted your homestead right and that at this time it has not been restored by law; therefore this notice, and you are further notified that the Hon. Commissioner of the General Land Office will undoubtedly hold your entry for cancellation on account of its illegality.

If you wish you can relinquish your entry No. 11185 and make application for the return of your fees and commissions.

Dickson took no action under the same notice, and he claimed the land as his homestead after the passage of the Act of May 22, 1902 (33 Stat., 203), which allows second homestead entries to be made by homesteaders who had prior to the passage of the Act of May 17, 1900 (31 Stat., 179) paid the price provided by the law opening the land to settlement. Dickson's second entry was reported to this office and was posted on the tract books, but this office did not take any action against the same on the ground of its irregular allowance.

On January 28, 1905, Seward K. Low filed an affidavit of contest against the said entry on the charge of abandonment for more than six months, not due to military or naval service, and failure to improve and cultivate the land. On the same day you issued notice setting the hearing for May 3, 1905. On the last-named day both parties appeared, and the defendant filed a motion for a continuance on the ground of the absence of two witnesses, Matt Crowdus and David Pieratt. The contestant opposed the motion on the ground that the defendant was not entitled to a continuance under the Circular of March 20, 1903, 32 L. D., 132, but stated that he had no objection to the taking of the depositions of the said witnesses. You overruled the motion, whereupon the case was continued until the afternoon on account of stress of business. In the afternoon the defendant filed an application, accompanied by interrogatories, to take the depositions of four witnesses, John Taylor, Lonnie Moffet, Otto Burgraph and John Close. The said application is not with the record transmitted by you. The contestant objected to the issu- [fol. 51] the record transmitted by you. The contestant objected to the issuance of a commission to take the depositions of the witnesses on the grounds, in substance,

1. That the testimony proposed to be taken is immaterial in that it relates to the entryman's acts subsequent to the service of the notice of contest.

2. That the application was filed out of time, as the issuance of a commission would necessitate the granting of a continuance.

You stated that you would decide the question after the hearing, whereupon both parties submitted testimony. After the hearing you held that the defendant was not, as a matter of right, entitled to take the depositions of the four witnesses mentioned, and that you would not consider the depositions if taken, but that you would allow the defendant to take the depositions in order that they might be with the record in the event of the transmission of the record of the case to this office on appeal. On May 27, 1905, the depositions of David Pieratt and Lonnie Moffet were taken before a notary Public in Gate, Oklahoma but no other depositions were taken.

By stipulation of the attorneys for the parties the testimony submitted at the hearing had before you was taken down in shorthand and afterwards transmitted and certified to by the stenographer who took the same, and the signature of the witnesses to their testimony waived. The sworn certificate of the stenographer is dated November 11, 1905;

On May 12, 1905, the defendant filed a motion, accompanied by three affidavits, to re-open the case for the taking of newly discovered evidence by depositions. You took no action on the said motion, as far as appears from the record, and on June 20, 1906, you rendered decision recommending the cancellation of the entry. The defendant's attorney accepted personal service of a copy of your decision on June 23, 1906.

[fol. 52] On July 20, 1906, the defendant filed a motion for a rehearing, which you overruled on July 30, 1906. The defendant filed an appeal on August 2, 1906. Briefs were filed by the attorneys for both parties, and on November 26, 1906, you transmitted the record to this office.

On July 2, 1903, the defendant applied to make a homestead entry for the land. He recited in his homestead affidavit that he had made the two entries a ove mentioned, but claimed the right of entry on the ground that his second entry was erroneously allowed. In a special affidavit accompanying the application he stated that he employed attorneys on June 27, 1906 to investigate the status of his second entry, and that the said attorneys advised him that his second entry was void because of its irregular allowance, and that he was entitled to make another homestead entry under the Act of May 22, 1902. You rejected the application for conflict with the second entry, and on the same day the defendant accepted service of notice of your action and of his right of appeal. On November 22, 1906, the defendant's attorney filed a carbon copy of an appeal from said action, stating in his accompanying affidavit that he made an entry on his docket on July 10, 1906, to the effect that he had on that day filed an appeal in your office, that he believes the appeal was in fact filed on that day, and that he had no knowledge that the said appeal had been lost or misplaced until November 22, 1904. No evidence of service of the said appeal was filed.

By letter of February 12, 1907, you transmitted "all papers in the case" but you made no reference to the original appeal alleged to have been filed on July 10, 1906. However, it will not be necessary to inquire whether the appeal was filed within thirty days after notice,

and whether it was accompanied by evidence of service, because the defendant contended in his motion for rehearing, and contends now [fol. 53] in his appeal from your decision on the merits, that his second entry was a nullity and consequently not contestable. And he further contends in his appeal from your rejection of his application to enter that his application to make homestead entry should have been allowed under the holding in the case of Jeremiah H. Murphy, 4 L. D., 467, that (syllabus):

A subsisting void entry is no bar to the subsequent legal application of the person who made such entry.

The second entry of Dickson comes squarely within the holding in the later cases of John J. Stewart, 9 L. D., 543; George W. Blackwell, 11 L. D., 384; and Smith v. Taylor, 23 L. D., 440.

In the cases of Stewart and Blackwell, the Department held that the right to make a second homestead entry, conferred by the Act of March 2, 1889, (25 Stat., 854), validates second entries erroneously allowed prior to the passage of the said act. In the case of Smith v. Taylor the defendant was irregularly allowed to make a second entry while his first entry was uncancelled. The Department allowed the entry to stand, saying in its decision:

If that entry should be cancelled for such irregularity it would be without prejudice to his right to make again entry for the same tract. Cancellation under these conditions would be a vain act.

Dickson deliberately chose to claim the land in controversy under his homestead entry, and this office would not have had authority to require him to make another entry for the land. It follows that it was incumbent upon him to comply with the requirements of the homestead law, that the allowance of his entry did not shield him against contest proceedings, and that he can not at this time be allowed to make another entry for the land. The hearing was regularly had, and the case will therefore be considered on the merits.

The records of your office show that Lowe filed an affidavit of [fol. 54] contest against the entry of Dickson on March 13, 1903 on the charge of abandonment. Notice was personally served on March 15, 1903, and hearing was had on May 14, 1903. On January 17, 1905, you rendered decision in the said case, recommending the dismissal of the contest. On January 28, 1905, the contestant withdrew his contest and on the same day initiated the present contest.

The contestant introduced six witnesses at the hearing, and testified in person. The following facts are taken from a summary of the testimony introduced by him: The defendant and his wife and daughter lived on the land in controversy about three weeks in November, 1903. When they left the land they moved to a place known as the Mackey ranch in Woodward County, from Twenty to Twenty-three miles from the land in controversy. Since then the land in controversy has not been used for grazing or agricultural purposes. The land is fit for agricultural purposes. There are no buildings whatever on the land except a small house without floor, in which the defendant and his wife and daughter lived in November, 1903. There is no well on the land. The contestant and

some of his witnesses saw the land at different times from the time the defendant left it until the initiation of the contest, and observed that no one resided on it. The notice of contest was served on the defendant by the contestant on January 30, 1905, at the Mackey ranch. The defendant said at the time of service that he knew that he had not lived on the land, but that he did not have to live on it.

The following facts are taken from the testimony given by the defendant in person: He is a stockdealer by occupation. He established his residence on the land in controversy about December 1, 1902. He did not establish his residence on the land within six months after his entry because there was some doubt as to the legality of the entry. The register of your office wrote him that his entry [fol. 55] was not legal but afterwards he told him that it was legal. The land has been his only home, but he was not always there. He lived on the land with his wife and daughter in November, 1903. That month he took his wife and daughter to the Mackey ranch, where he had bought some feed for his stock. He owned nearly two hundred head of cattle at that time, which he moved to the Mackey ranch in order to winter them there. The land in controversy was a "cold, bleak place", and not a good place on which to winter cattle. In February, 1904, while he was still on the Mackey ranch, the cattle were quarantined and it became necessary for him to stay there and take care of them until they could be dipped. He did not pay any rent while he stayed on the Mackey ranch. The cattle were dipped about June 10, 1904, and then he exchanged them for other cattle. At that time he returned to the land in controversy with his family. On July 2, 1904, his wife and daughter left the land and went to Iowa. His wife went to Iowa on a visit and "aimed for the girls to go to school up there." She intended to return in September, but was taken sick and had not returned up to the time of the service of notice of contest. From July, 1904 to the time of the service of the notice of contest he was on the land "the greatest part of the time" looking after his stock. He took his meals on the land and slept in his house. There was not enough pasture on the land to maintain his stock. It was his understanding that it was necessary to plow and cultivate the land, and that grazing would answer the purpose of cultivation under the homestead law. It was more profitable for him to use the land for grazing than it would have been to use it for farming. In June, 1904, he hauled some fencing to the land and commenced to build a fence which he finished in September. In July, 1904, or "A short time before that" he bought some cattle from one Ravencraft, on Ravencraft's ranch adjoining the Mackey ranch. Those cattle were still on Ravencraft's ranch when the [fol. 56] notice of contest was served on him. At that time he also owned thirty or thirty-two horses. Three horses were on Ravencraft's ranch, and the balance were in Belvedere County, Kansas. From September, 1904, to November 10, 1904, he had cattle on the land in controversy, a part of the time fifty head. He "shipped" the cattle, and did not keep any during the winter from 1904 to 1905. He stayed on the land in controversy "over one-half the

time" in December, 1904, and he also stayed on the land "the first part of January" 1905.

The following facts are taken from the testimony of Robert Clark, the only witness who testified in behalf of the defendant on the question of residence at the hearing had before you: The witness resides in Gate Township, Beaver County, and he is "somewhat" acquainted with the land in controversy. About the middle of January, 1905, he was out of fuel, and Mr. Dickson came to his place and said that he had fuel at his house, and told him to go there and get some. The witness went to the defendant's house and got some coal. While he was there he observed that the defendant had a cook stove set up for use and that he had two other stoves, a "Topsy" and a coal heating stove, that were not set up for use. He also had a bedstead and a bed, a safe with dishes of all descriptions in it, and some rocking chairs and other chairs. The house was very well furnished.

The contestant then introduced five witnesses who testified that the defendant's reputation for truth and veracity is bad.

David Pieratt testified in his deposition that he resided about four miles north-west of Gate, Beaver County, during the year 1904, and January, 1905. During the six months prior to January 28, 1905, he saw the defendant on the land in controversy "about two or three times" under circumstances which indicated that he resided [fol. 57] there. His house is fourteen by sixteen feet in size and it is well furnished with the necessary household goods.

Lonnie Maphet gave the following answer in response to the second direct interrogatory, as to the defendant's residence and cultivation of the land:

I don't think he made his residence till the fall of 1903 and not very long then. And as to grazing purposes, I think he has used it for that purpose all the time.

In response to the cross-interrogatories, Maphet testified that he resides five miles from the land in controversy. On election day of 1904, he and Dickson grazed a heard of cattle on the land in controversy and went to a neighbor for dinner. After dinner Dickson took the cattle away and shipped them. The witness passed by the land in controversy "several times" and did not see Dickson residing there. There are no improvements on the land except a small box house and some fences.

The defendant's motion for the re-opening of the case on the ground of newly discovered evidence is based on allegations, made in the accompanying affidavits, that the defendant's house can not be seen from a certain road east of the land, which road had been traveled by some of the witnesses for the contestant who testified that the defendant did not reside on the land. It does not appear from the motion that the alleged newly discovered evidence was not known to the defendant at the time of the trial, and that it could not have been discovered by the exercise of proper diligence, The motion was therefore insufficient. Connelly v. Boyd, 10 L. D. 489.

The defendant's motion for a rehearing was based on allegations of error in over-ruling the motion to re-open the case, in holding the testimony sufficient to warrant the cancellation of the entry, and in considering the testimony at all, because the stenographer who took the testimony had not filed any affidavit showing that the [fol. 58] transcript of the testimony "is a true and correct statement of the testimony actually given by the witnesses after being duly sworn."

The reasons assigned in the motion are clearly not grounds for a rehearing. It is observed that the stenographer's certificate filed November 11, 1905, does not follow the words of Rule 42 of Practice. The said certificate is here set out;

I, Gernard W. Sawyer, hereby certify that the within purported transcript is a true, correct and complete transcription of the testimony given in said case as taken by me in shorthand during the trial of said cause, as same was given by the witnesses testifying herein after same were duly sworn.

The certificate substantially complies with the requirement of Rule 42 of Practice, and it will be accepted as sufficient.

You found in your decision that the defendant had failed, for more than six months preceding the initiation of the contest, to reside upon and cultivate the land. This office concurs in your finding. The decision appealed from is accordingly affirmed, and the defendant's homestead entry is held for cancellation.

Duly advise the parties in interest of this decision and the defendant of his right of appeal.

Very respectfully, Fred Dennett, Acting Commissioner.
Board of Law Review, by T. M. K.

MJV.

[fol. 59] EXHIBIT "F" TO SECOND AMENDED AND SUPPLEMENTAL PETITION

Department of the Interior, Washington

D-2178

SEWARD K. LOWE

vs.

ALEXANDER J. DICKSON

Homestead Contest. Appeal

Feby. 13, 1908.

The Commissioner of the General Land Office.

SIR: Alexander J. Dickson appealed from your decision of July 8, 1907, canceling his homestead entry for the S. W. ¼ S. E. ¼, S. ½ S. W. ¼ Sec. 15 and N. W. ¼ N. E. ¼, Sec. 22, T. 5 N., R. 28 E. C. M., Woodward, Okla.

May 22, 1894, Dickson made a homestead entry for W. ½ S. W. ¼ and W. ½ N. W. ¼, Sec. 15, T. 28 N., R. 25 W., on which, December 28, 1899, he made final proof and payment, final receipt and cash receipt that day issued, and the land was patented to him April 24, 1900.

February 27, 1902, he executed application for homestead entry for the first above-described land, imperfectly describing that in his first entry, stating that he "paid out on it about three years ago," and the local office allowed his second application March 3, 1902, and March 6, 1902, the register advised him that:

> On further examination * * * it was found that while you paid the legal price for the land, you in reality made five year proof [fol. 60] under Sec. 2291 of the Revised Statutes; that final receipt issued for your proof, and * * * cash receipt issued for payment of the money and interest due on the land. This office finds your entry was erroneously allowed, because when you made final proof you exhaused your homestead right, and that at this time it has not been restored by law; therefore this notice, and you are further notified that the Hon. Commissioner of the General Land Office will undoubtedly hold your entry for cancellation on account of its illegality. If you wish you can relinquish your entry and make application for return of fees and commissions.

Dickson took no action, though he received notice, and claimed the land as his homestead after the act of May 22, 1902 (32 Stat., 203) allowing such entries by those who before the act of May 17, 1900 (31 Stat., 179), paid the price fixed by the law opening the land to settlement. Your office never took action against his second entry for its irregularity.

March 13, 1903, Seward K. Lowe filed contest against the entry charging abandonment, upon which hearing was had May 14, 1903, and January 17, 1905, the local office found for Dickson and recommended dismissal of that contest. January 28, 1905, Lowe dismissed that contest and instituted the present one, charging abandonment for more than six months and failure to improve and cultivate, on which notice issued for hearing May 3, 1905, when both parties appeared, and Dickson asked for continuance for absence of two witnesses named, which Lowe opposed, consenting to taking of their depositions. The local office refused the continuance, and Dickson filed application, with interrogatories, to take depositions of those two and two other witnesses. Lowe objected to issue of the commission, because: 1. The inquiries related to acts after service of contest notice and were immaterial, 2. that the application was out [fol. 61] of time, as issue of commission would work a continuance. Thereupon both parties submitted testimony.

After the hearing the local office held that Dickson was not of right entitled to take the deposition and they would not be considered if taken, but that he might take and file them for transmission with the record in case of appeal. Depositions of the two witnesses first named were taken and filed.

By stipulation of counsel the oral testimony submitted was taken

in shorthand and signature of witnesses waived. The stenographer transcribed and filed the testimony, but his certificate was not made or dated, till November 11, 1905.

May 12, 1906, Dickson moved, upon three affidavits, to reopen the case for taking newly discovered evidence by deposition. The local office made no express ruling, but June 20, 1906, found for Lowe, and recommended cancellation of the entry service of which Dickson's counsel receipted June 25, 1906. July 20, 1906, he moved a rehearing, which the local office denied, July 30, 1906, and August 2, he appealed.

July 2, 1906, Dickson applied for homestead, reciting the two entries mentioned, and claiming right of entry because the second was erroneously allowed, filing an affidavit that he employed counsel June 27, 1906, to examine into his second entry, and was by them advised that it was because of erroneous allowance and that he was entitled to another entry under the act of May 22, 1902. The local office rejected his third application, and the same day he accepted notice of such action and of right of appeal. November 22, 1906, Dickson's counsel filed copy of an appeal, with his affidavit that July 10, 1906, he minuted on his docket the filing of an appeal that day in the local office, and believes it was that day filed, and that he had no knowledge till November 22, 1906, that was lost or misplaced. No evidence of service of the appeal was filed. The [fol. 62] local office transmitted the case without referring to the alleged appeal of July 10, 1906.

You held the fact and regularity of the alleged appeal of July 10, 1906, and the original invalidity of the second entry, were immaterial questions, because Dickson's continued assertion of right under his second entry after passage of the act of May 22, 1902, supra, cured the entry and made it valid, citing Smith v. Taylor (23 L. D. 440); George W. Blackwell (11 L. D., 384); John J. Stewart (9 L. D. 443); and that the entry having been thus validated, the rule in Jeremiah H. Murphy (4 L. D., 467), that a void entry is no bar to the subsequent legal application of the same person, did not apply to the case; that his second entry having become valid, he was bound to pursue it in compliance with law, and could not defeat contest of it by electing after contest was waged to treat it was invalid.

The motion to reopen the case on the ground of newly discovered evidence you held insufficient because there was no showing that such evidence was not known, or could not have been by due diligence discovered and adduced at the trial. The motion for rehearing you held for the same reason not meritorious. Reviewing the evidence upon the merits you found the charge proven, affirmed the action of the local office, and canceled the entry.

Appellant contends that it was error to find that his application for the present entry did not fully describe the land included in the former one. As your decision was in no respect based on this fact, there was no assignable or prejudicial error. Mention of the fact appears to have been made merely to explain the error of the local office in allowing the entry—not as ground for cancellation of it.

It is contended that the local office letter of March 11, 1902, supra, "operated as a suspension of the entry" up to the date of your decision, and excused Dickson from residence on the land. The [fol. 63] letter of March 11 can not bear that construction. Granting that the local office had power to correct its error by suspending the entry and notifying Dickson that it was held for cancellation, yet the letter shows the local office did not take that course. The entry was regularly reported to your office. The letter to Dickson did not in terms suspend the entry or assert any purpose to cancel it. The fact of its being reported to your office, thus passing it out of the local office jurisdiction, without any action of the local office against the entry, shows this letter was not intended to suspend or affect it. It can bear no other construction than that it was merely an advisory letter, suggesting relinquishment for avoidance of action by your office for its cancellation. No appeal from it or assignment of error based upon it could have been taken. As it did not in terms or by implication suspend the entry, it did not relieve the entryman from compliance with the law.

Dickson contends his appeal from rejection of his application of July 30, 1906, should have been considered. To this there are two full answers. A controversy was being waged, and if he could appeal from rejection of his application, he was bound to serve the appeal upon his adversary. But it is also sufficient answer that he then had an entry of the same land which stood in the way of and prevented allowance of that application. That being the condition of the land, he had no valid ground for an appeal, right to be prejudiced or preserved, nor in respect to that application could any error of the local office, had there been error of procedure, be immaterial.

That his second entry of March 3, 1902, became good on passage of the act of May 22, 1902, is clear upon the decisions cited by your office. Having a record entry which he was asserting, the act granting [fol. 64] a second right, in absence of any adverse right, cured all infirmity of the entry at its initiation. He could not assert the entry to be valid and at the same time regard it as void. As he asserted it to be good, and the law permitted it, he was bound to comply with the law of that entry.

This disposes of Dickson's fourth assignment of error. Concede that the result of the first contest was an adjudication between the parties that Dickson had established residence and complied with the law up to close of that hearing, May 24, 1903, it left the question open as to compliance after that date.

Appellant assigns error as to authentication of the transcript of testimony. Counsel before the hearing stipulated in writing that:

The testimony in this case shall be taken in shorthand as given by the respective witnesses, and same afterwards transcribed and certified to by the stenographer taking same, and signatures of the various witnesses testifying are hereby waived.

The transcript of testimony does not show at what time it was made and filed in the local office other than may be inferred by its first page:

United States Land Office, Woodward, Oklahoma Territory

May 3, 1905.

SEWARD K. LOWE, Contestant,

v.

ALEXANDER J. DICKSON

I, Gernard W. Sawyer, hereby certify that the within purported transcript is a true, correct, and complete transcription of the testimony given in said cause as taken by me in shorthand during the trial of said cause as the same was given by the witnesses testifying herein after same were duly sworn.

Bernard W. Sawyer.

[fol. 65] Subscribed and acknowledged before me 11 November, 1905. E. S. Wiggins, Rec'r.

I, Dick T. Morgan, hereby certify that the within named witnesses were duly sworn by me to testify in said cause before giving the testimony herein.

Dick T. Morgan, Receiver.

On this state of the record Dickson's counsel, July 19, 1906, in his motion for rehearing first made objection to the transcript of evidence, that the local office erred in considering it because—

the stenographer who took such testimony in shorthand has never filed an affidavit showing that such purported transcription thereof is a true and correct statement of the testimony actually given by witnesses after being duly sworn. * * * because such transcript is not accompanied by a certificate of the officer before whom the testimony was taken that each of the witnesses was sworn before testifying.

This objection is insisted upon because:

Rule 42 of Practice expressly requires the affidavit of the stenographer * * * that the stenographer did not make any affidavit whatever as to the correctness of his shorthand notes, nor that his transcript thereof is "a true and correct statement of the testimony actually given by the witnesses."

The record thus shows that from November 11, 1905, to July 19, 1906, Dickson and his counsel were content to regard and did regard the transcript of evidence as correct and authentic. It would be mere trifling to permit them afterward to deny the accuracy of what they for eight months, while the action pended in the local office, treated as accurate and authentic. They cannot be permitted to stand silent and gamble on the chances of decision to be deduced from such record and they say there was no record. Had the ob-

jection been made before the local office decision, the defect might [fol. 66] have been cured.

But other reasons exist to deny this contention had it been made to the record of testimony in due time before the local office decision. Rule 42 of Practice does not preclude the parties and counsel from authenticating the transcript of testimony in any other manner they see fit. It remains a matter for agreement of parties and governs only cases wherein parties or counsel agree on no other mode of authentication. In the present case the stipulation expressly provided that the transcript should be "certified to by a stenographer." In certifying the stenographer followed the rule agreed to by the parties, and it is not permissable to them afterward to insist upon a different rule than that they fixed and in which they acquiesced for so long a time after full compliance with it.

For another reason the objection is not good. Rule 42 does not apply to the local office as basis for its decision, but aims at perpetuation of the evidence, with view to appellate proceedings before your office and the Department. The local office is not thereby restricted in its action. It may determine a matter upon the evidence given before it as it rests in its memory or may aid its memory by reference to the shorthand or other notes taken at the time. It is only in case of appeal that the parties must necessarily be at expense of a full and authentic transcript of the testimony given before the local office, though that office may require one whenever found it to be necessary. A transcript when made and by whomever made can not be disregarded. After being recognized by the local office, unless its inaccuracy is in some way, in some material respect, reasonably proved. That in the present case is not done. [fol. 67] No attempt is made to show the transcript of testimony is in any respect inaccurate, and the objections to it as to mere matter of form of authentication are for reasons given insufficient and without merit.

Nor was there merit in the motion to reopen the case for rehearing. No surprise was shown or inability at that time to adduce evidence that defendant's house was not visible from the road traversed by some of the witnesses who testified to observing from that road that defendant did not reside on his land. If the witnesses desired were not present defendant could have asked then for a continuance to produce them or for time to take their testimony by deposition. He rested his case and chose to abide the record as made. The fact that contrary to his expectation the decision went against him is not such surprise as is ground for new trial.

Examination of the testimony upon the merits, including that offered for impeachment, shows that the concurring decisions of the local office and of your office reviewing the testimony in detail are fully sustained by the record, and your decision is affirmed. The papers are herewith.

Very respectfully, (Signed) Frank Pierce, First Assistant Secretary.

[fol. 68] EXHIBIT "G" TO SECOND AMENDED AND SUPPLEMENTAL PETITION

Secretary's Office, Department of the Interior, Washington, D. C.

D-2178. Doc. 17029

SEWARD K. LOWE

v.

ALEXANDER J. DICKSON

Rehearing. Allowed. Woodward H. E.

Sept. 8, 1908.

The Commissioner of the General Land Office.

SIR: May 5, 1908, the Department entertained a motion for rehearing in the case of Seward K. Lowe v. Alexander J. Dickson, involving the latter's homestead entry made March 2, 1902, for the S. W. /4 S. E. /4 S. /2 S. W. /4. Sec. 15, and the N. W. /4 N. E. /4, Sec. 22, T. 5 N., R. 28 E., Woodward, Oklahoma.

It appears that the Department on February 13, 1908, affirmed the action of your office and the local office, holding for cancellation said entry, as the result of a hearing in a contest filed by said Lowe January 28, 1905, alleging abandonment.

The motion for rehearing was duly served on the opposite party who has filed certain affidavits and a brief in opposition thereto.

[fol. 69] In this contest Lowe adduced testimony tending to prove that Dickson and his wife lived on the land but a few weeks in November, 1903, then moved to the Mackey Ranch twenty miles away after which the land entered was not used for grazing or agriculture, and casually passing they saw no one residing there though none said Dickson had a home elsewhere or knew he did not live on the land.

Dickson testified tending to show that his business was that of dealing in cattle, owning at times several hundred, and some horses; that at times there was insufficient pasture on his land and he had to drive his stock to other pasture requiring his absence from his land much of the time; late in fall of 1903 he took some cattle to the Mackey Ranch where they became deseased and were quarantined and he stayed with them most of the time to June 1904 when the cattle were "dipped" to cure the disease, but that he did not change his residence from his land, left all his household goods there except a couple of bed-quilts and some blankets which were temporarily taken to the Mackey Ranch; that he grazed the land in fall of 1904, and from July 30, 1904, to January 30, 1905, the six months preceding contest, he was on his land, slept and took his meals there "the greatest part of the time."

Testimony was offered tending to impeach his veracity in part by witnesses of admitted unfriendly feeling. Some of this was incompetent for impeachment being of facts in knowledge of the witnesses in their transactions with him. The record should not be loaded with personal grievances of impeaching witnesses as proof of a witness's bad reputation for veracity.

Defendant claims he was surprised by the effort to impeach him and he was too far from home and neighbors to meet the unexpected attack: also that witnesses who promised him to attend and testify, [fol. 70] upon whom he relied, were unavoidably absent.

The motion for rehearing submits nine affidavits tending to support defendant's veracity opposed to which are an equal number. One of these on each part for and against his veracity is by the same person, valueless for any purpose except to show the affiant's insensibility to the obligation of an oath.

Surprise from non-attendance of witnesses not subpœnaed is not ground for rehearing, but as contestant made no strong case and defendant clearly was surprised by the evidence at the hearing for impeachment of his own very material testimony it is not clear that a just result was reached and for that reason a rehearing is granted. The finding of the local office and all subsequent proceedings are vacated and the case is remanded for rehearing before the local office.

Very respectfully, (Signed) Frank Pierce, First Assistant Secretary.

Rec'd this copy and acknowledged personal service this 5th Oct. 1908.

[fol. 71] EXHIBIT "H" TO SECOND AMENDED AND SUPPLEMENTAL PETITION

Department of the Interior, United States Land Office, Woodward, Oklahoma

October 30, 1909.

Contest No. 4521. 812,765-1. Serial No. 03293. 03292

SEWARD K. LOW, Contestant,

vs.

ALEXANDER J. DICKSON, Contestee

Involving H. E. 11185, for the S. W. ¼ S. E. ¼, S. ½ S. W. ¼, Sec. 15. and N. W.¼ N. E. ¼ Sec. 22, Twp. 5 N., Range 28 E. C. M.

Decision of Register and Receiver

On September 8, 1908, the Secretary of the Interior remanded the above entitled case for further hearing, vacating all former decisions.

Case was set for May 18, 1909, before W. T. Quinn, Beaver, Oklahoma, final this office on June 21, 1909, and testimony was received in this office on the last mentioned date.

We have given this case a very careful examination, closely following the testimony of the different witnesses produced by both sides, and can come to no other conclusion than that the entry should be held for cancellation.

In our judgment, the hearing was not beneficial to the defendant; on the contrary, the new witnesses examined in the new trial more completely forged the chain of evidence that warrants us in arriving at the conclusion above-mentioned.

Eliminating entirely the question of impeachment, of which claimant complained in his application for a re-hearing, the evidence clearly shows, in our judgment, that the claimant, nor his family resided upon said land at the time mentioned in the affidavit of contest. The testimony of Witness Jones, the freighter, who, during the time mentioned in said appeal, hauled freight every week across the land in dispute and saw no evidence of occupancy of the house, or any evidence of any one having lived there for a long time [fol. 72] previous to the dates above mentioned; there were no stables or other outhouses necessary for family use; nothing in fact that would indicate that any one resided upon the land. While there was more or less prejudice shown for and against the defendant, yet Jones seemed to be entirely unprejudiced. Other witnesses for the contestant corroborated Jones in almost every particular.

Littlie Pound, witness for the defendant, made a very poor witness in his behalf; swearing upon cross-examination that she did not see him during that time. Witness Piratt finally swore he "did not know whether he was there or not. Witness Taylor, for the defendant, was unable to swear that Dickson lived in said house, either by himself or with his family. Witness Hubbard, who took the assessment during the time mentioned in the affidavit of contest, swore that he was upon the land often, and found no one living there, or any evidence of anyone having lived there for some time. Witnesses, friends of defendant, admitted he did not reside upon the claim with his family like they did with theirs, but that he was there off and on.

The fact is, the evidence conclusively shows that the claimant was a cattleman and had no home anywhere in particular. He, no doubt, located *the* this claim for the purpose of securing the grass and using the same as a cattle camp, more than anything else, and had no idea of living there with his family. It will be particularly noticed that none of the witnesses swore to his family residing upon the land: they saw some of them there occasionally, but only occasionally.

It is true, that portion of the country was then, or just prior thereto, known as "No Man's-Land" and very thinly settled, and was regarded by defendant and other cattlemen as wholly unfit for [fol. 73] agricultural purposes; yet this same land was being gradually taken up by settlers for farming purposes, but the defendant knew there was little probability of his being molested as settlers were coming slowly, hence his carelessness in complying with the

homestead laws. It does not matter what the condition of the country was, whether it was best adapted for grazing or farming, it was incumbent upon the defendant to comply with the homestead laws, the same as though he was in the best farming country in this state. He was a cattle buyer; his home was "wherever his hat was off;" this claim was no place for him and his family or his cattle; he had erected no stables or corrals for his horses or other stock; no outhouses of any kind seemed necessary for the accommodation of his family. It was not his home; he and his family did not eat there, sleep there and make that land their home, to the exclusion of all other places.

We, therefore, recommend the cancellation of H. E. 11185 of Alexander J. Dickson, subject to his right of appeal, within thirty days, to the Commissioner of the General Land Office.

(Signed) Geo. D. Orner, Register. C. C. Hoag, Receiver.

EXHIBIT "J" TO SECOND AMENDED AND SUPPLEMENTAL PETITION

WHW. WHW.

Department of Interior, General Land Office, Washington

H. E. No. 11185

SEWARD K. LOWE

vs.

ALEXANDER J. DICKSON

Cancellation. Affirmed

December 24, 1909.

[fol. 74] Register and Receiver, Woodward, Oklahoma.

SIRS: By letter of December 2, 1909, you transmitted the record in the above entitled case, including defendant's appeal from your decision recommending the cancellation of his entry.

March 3, 1902, Alexander J. Dickson made H. E. No. 11185, for the S. W. ¼ S. E. ¼, S. ½ S. W. ¼, Sec. 15 and N. W. ¼ N. E. ¼ Sec. 22, T. 5 N., R. 28 E.

January 28, 1905, Seward K. Lowe filed his affidavit of contest against said entry charging that:

Alexander J. Dickson has wholly abandoned said tract for a period of more than six months since making said entry and next prior to the date herein; that he has wholly failed to cultivate and improve said tract as required by law; that said defaults have not been cured, and that defendant's absence from the land was not due to military or naval service etc.

The record shows that the first hearing in this case was had before the local office beginning May 3, 1905. After a lengthy hearing, the then local officers, June 2[illegible], 1906, found that though defendant was a man of ample means, he made no excuse for his absence from his claim, that the undisputed testimony showed that the defendant was a man of ample means, he made no excuse for his absence from his claim, that the undisputed testimony showed that the defendant had, to date of contest, placed a small house on the land covered with board, with a dirt floor, and with one door fastened with a lock on the outside; that only a small strip of land, for a fire guard around the house, had ever been broken, that none of the land had ever been [fol. 75] cultivated; that no outbuildings had been erected, had no well dug, or other place to obtain water even for domestic purposes; that the land was all suitable for cultivation; that defendant admitted that his wife and child had not been on the land since July, 1904, but had been in the state of Iowa during that time; that the indisputed facts showed that defendant did not make the land his home during the period covered by the contest affidavit.

From the facts found by the then Register and Receiver, they recommended the entry for cancellation.

On appeal to this office, by office letter "H" of July 8, 1907, the decision of the local officers was affirmed, after an exhaustive finding of the facts in the case. Defendant appealed to the Department, and on February 13, 1908, the concurring decisions of the local office and this office were affirmed, finding that a review of the testimony in detail was fully sustained by the record made.

Defendant then filed a motion for rehearing, and supported the same by affidavits.

The showing was made, that testimony was offered tending to impeach his reputation for truth and veracity, that he was surprised by the effort to impeach him, and he was too far away from home and his neighbors to meet this unexpected attack.

From the showing made, the Department vacated all the proceedings, and remanded the case for rehearing.

Pursuant to instructions, and the application of the defendant, the parties were notified of a hearing to be had before the clerk of the district court at Beaver, Oklahoma, May 18, 1909, at which time and place the parties appeared and submitted testimony.

From the evidence adduced, after "very careful examination, closely following the testimony of the different witnesses produced by [fol. 76] both sides", you were of the opinion that no other conclusion could be arrived at but that the entry should be held for cancellation; that in your judgment, the second hearing was not beneficial to defendant, but on the contrary, the new witnesses examined forged a more complete chain of evidence to warrant you in arriving at the conclusion you did. That, eliminating any question of defendant's impeachment, for which he complained before the Department, the testimony clearly shows that defendant, nor his family, resided on the land at the time mentioned in the contest affidavit; that the testimony of witness Jones, the freighter, who, during the time mentioned, hauled freight every week across the land

in dispute and saw no evidence of occupancy of the house, or any evidence of any one having lived there for a long time previous to the dates mentioned in the contest affidavit, was exceedingly strong; that there was no stable or other outhouses necessary for family use on the land, and in fact, nothing to indicate that any one resided on the same; that while there was more or less prejudice shown for and against the defendant by certain witnesses, witness Jones seemed to be entirely unbiased; that the other witnesses for plaintiff corroborated Jones in almost every particular.

That for defendant, witness Pound made a very poor showing, swearing on cross-examination that she did not see defendant during the time under consideration; that witness Parratt finally testified he "did not know whether -he (defendant) was there or not"; that witness Taylor was unable to testify that defendant lived in the house, either himself or with his family. That witness Hubbard, who was the assessor during the time mentioned, testified that he was on the land often and found no one living there, or any evidence of any one having lived there for some time. That witnesses, friendly to defendant, admitted that he did not reside on the claim [fol. 77] with his family like they did on their's but that he was there off and on.

You further found that defendant, as was conclusively shown, a cattlemen, and located the claim for the purpose of securing the grass and using the claim as a cattle camp more than anything else, and had no idea of living there with his family. That none of the witnesses testified to the family residing on the land. That the land in question was not defendant's home, he and his family did not eat there, sleep there, or make the land their home to the exclusion of a home elsewhere. You, therefore recommend the cancellation of the entry.

Each and every fact found by you is fully supported by the record of the testimony submitted.

As stated by you, defendant was engaged in the cattle business, but he had no stables or corral on the land in which to house or shelter stock of any kind. He did not even make the land a headquarters for his herds of cattle and horses. While he was a man of some means as found by your predecessors, the claim was never improved for family purposes. No well, or other place to obtain water even for domestic purposes. No toilet, or other out-houses of any kind were ever placed on the land. In fact, the testimony clearly shows that defendant never established a bona fide residence on the land, much less to maintain one.

At the general election in November, 1904, defendant proposed to exercise his right of franchise in that precinct. His vote was challenged on the ground he was not a resident. A blank affidavit was handed him to make out, sign and swear to, so as to qualify him as an elector. After reading the affidavit, he refused to sign it and left the polls without casting his vote. This undisputed fact [fol. 78] is rather significant as to what defendant himself thought as to being a resident of that precinct.

On the charge of failure to improve and cultivate the land, the testimony is as conclusive against defendant as is that of his failure to reside there. Not even a garden was ever cultivated by defendant on the land.

Your decision being clearly right, it is affirmed.

Defendant's entry is held for cancellation, subject to the right of appeal.

Notify the parties hereof, and defendant of his right of appeal to the department.

Respectfully,

S. V. Proudfit, Assistant Commissioner. Board of Law Review, by Julius Andres. H. J.

EXHIBIT "K" TO SECOND AMENDED AND SUPPLEMENTAL PETITION

Department of the Interior, Washington

E-3378. G. C. R. G. C. R. A. W. P.

Woodward, 03293. "H"

SEWARD K. LOWE

v.

ALEXANDER J. DICKSON.

Appeal. Affirmed

May 26 1910.

The Commissioner of the General Land Office.

SIR: Alexander J. Dickson has appealed from your office decision of December 24, 1909, which affirms the action of the Register and Receiver, holding for cancellation his homestead entry No. 11185, made March 3, 1902, for the S. W. ¼ S. E. ¼, S. ½, S. W. ¼, Sec. 16 and N. W. ¼ N. E. ¼, Sec. 22, T. 5 N., R. 28 E., Woodward, Oklahoma.

The action resulted from a contest filed January 28, 1905, by [fol. 79] Seward K. Lowe, alleging that

Alexander J. Dickson has wholly abandoned said tract for a period of more than six months since the making said entry and next prior to the date herein; that he has wholly failed to cultivate and improve said tract as required by law; the said defaults have not been cured.

It appears that a former hearing was had before the local officers in the case May 3, 1905. The hearing was had upon the charges above set forth, and the local officers, June 20, 1906, found in favor of contestant, holding that contestant had established the allegations in his said contest affidavit. On appeal, your office, July 8, 1907, affirmed the action of the local officers, and on further appeal, the Department concurred in the action below.

A motion for rehearing was filed, supported by sundry affidavits. On consideration thereof, the Department vacated all the proceedings and remanded the case for rehearing.

At the last hearing a large amount of testimony was taken. The testimony in this case, from first to last, is very voluminous. It has all been carefully reviewed.

It seems unnecessary to enter into a discussion of the testimony in this case. The Department considered it just to allow defendant to present further testimony in support of his entry, owing to the allegations made in the motion for rehearing and the affidavits accompanying same. Much of the testimony is quite irrelevant,—indeed, some of it has little bearing upon the case.

After due consideration of all that is stated in the appeal, with its supporting argument, the Department finds no sufficient grounds for disturbing the concurring actions of your office and the local office. The decision appealed from is accordingly affirmed and the papers [fol. 80] in the case are herewith returned.

Very respectfully, Frank Pierce, First Assistant Secretary.

Department of the Interior, Washington

E-3378. 812,765-14. J. F. F. J. F. F. A. W. P.

Jul. 23, 1910.

"H" .03293, Woodward. H. E. 11185

SEWARD K. LOWE

v.

ALEXANDER J. DICKSON

Motion for Review Denied

The Commissioner of the General Land Office.

SIR: Alexander J. Dickson has filed motion for review of unreported departmental decision of May 26, 1910, affirming your decision of December 24, 1909, which affirmed the action of the register and receiver and held for cancellation his homestead entry number 11185, made March 3, 1902, for the S. W. ¼ S. E. ¼ and S. ½ S. W. ¼ Sec. 16 and N. W. ¼ N. E. ¼ Sec. 22, T. 5 N., R. 28 E., Woodward, Oklahoma, land district, on the contest of Seward K. Lowe.

Upon examination of the record in connection with the arguments in support of this motion, it is found that no new question is presented, but the motion and argument are in effect an elaborate reargument of the case upon the merits upon the testimony appearing in the record. The voluminous record has been carefully examined and no reason is found to disturb the departmental decision under [fol. 81] review.

The said motion is accordingly denied, and, with the accompanying papers, returned to your office.

Very respectfully, Frank Pierce, First Assistant Secretary.

[fol. 82] EXHIBIT "L" TO SECOND AMENDED AND SUPPLEMENTAL PETITION

THE UNITED STATES OF AMERICA:

To all to whom these presence shall come, Greetings:

Whereas, a Certificate of the Register of the Land Office at Guthrie, Oklahoma has been deposited in the General Land Office, whereby it appears that, pursuant to the act of Congress of May 20, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain," and acts supplemental thereto, the claim of Seward K. Lowe has been established and duly consummated, in conformity to law of the South Half of the South-west Quarter and the South-west Quarter of Section 15 and the North-west quarter of the North-east quarter of Section 22 in township five North of Range Twenty Eight East of the Cimaron Meridian, Oklahoma, containing one hundred and sixty acres, according to the Official Plat of the survey of the said land, returned to the General Land Office by the Surveyor General:

Now know ye, that there is, therefore, granted by the United States unto the said claimant, —— ——, the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said claimant, —— ——, and to the heirs and assigns of the said claimant, —— ——, forever; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

In testimony whereof, I, Woodrow Wilson, President of the United States of America have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington the Thirteenth day of April in the year of the Lord one thousand nine hundred and [fols. 83 & 84] eighteen and of the Independence of the United States the one hundred and fourty second.

By the President: Woodrow Wilson, by M. P. LeRoy, Secretary. T. C. Lamar, Recorder of the General Land Office.

Record: Patent Number 625,429. State of Oklahoma, Beaver County, ss. This instrument was filed for record the 18th day of Feb. A. D. 1919, at two o'clock P. M., and duly recorded in Book 44 of W. D. Page 104. A. S. Foster, County Clerk.

Ex. L.

[File endorsement omitted.]

[fols. 85-93] IN DISTRICT COURT OF BEAVER COUNTY

DEMURRER OF DEFENDANT SEWARD K. LOWE TO SECOND AMENDED PETITION—Filed Sept. 23, 1919

Comes now the defendant, Seward K. Lowe, and demurs to plaintiff's second amended petition upon the following grounds and reasons.

(1) That said second amended petition wholly fails to state facts sufficient in law to constitute a cause of action in favor of plaintiff and against this demurring defendant.

C. W. Herod, Swindall & Wybrant, Attorney- for Defendant Seward K. Lowe.

[File endorsement omitted.]

[fol. 94] IN DISTRICT COURT OF BEAVER COUNTY

[Title omitted]

AMENDED ANSWER—Filed Dec. 7, 1921

Comes now the defendants and for their amended answer to plaintiff's second amended petition leave of court having first been obtained says:

First. That these defendants deny each and every allegation in plaintiff's second petition contained save and except as herein afterwards specifically admit to be true.

Second. Defendants admit that they are husband and wife and further admit that on the 13 day of April, 1918, the United States of America issued and delivered to the defendant, Seward K. Lowe, a patent to the Southwest Quarter of the Southeast Quarter and the South Half of the Southwest Quarter of Section Fifteen and the Northwest Quarter of the Northeast Quarter of Section Twenty Two all in Township Five, North of Range Twenty-eight, East of the Cimarron Meridian in Beaver County, Oklahoma.

Third. Defendants for their other and further defense to plaintiffs second amended petition say, that here-to-fore, and on or about the 27th day of February, 1902, the above described lands belonged to the United States of America, and that the same was vacant and unappropriated public lands of the United States, and that said [fol. 95] lands was on the 27th day of February, 1902, open to entry under the homestead laws of the United States and that on or about the 27th day of February, 1902, this plaintiff made an application to enter said lands under the homestead laws of the United States and that said application was made before and in the Department of the Interior, and defendants further say that on or

about March 3d, 1902, the application of said plaintiff to enter said lands was allowed by the Department of Interior and that said entry was then and there duly numbered homestead entry Number 11185, Woodward Oklahoma series, and these defendants say that the Department of the Interior of the United States was then and there a tribunal created by act of Congress and was then and there a part and portion of the Executive Department of the United States of America and that said Department of the Interior then and there had great judicial authority and held exclusive right, power and authority to pass upon and determine the qualifications of applicants to enter the land under the homestead laws of the United States, and these defendants say that the question of whether or not this plaintiff was at the time of said application and the allowance thereof qualified to enter said land under the homestead laws of the United States was then and there a question involving matters of fact and that the facts relating to plaintiff's qualifications to enter said land were duly presented to the Department of the Interior in connection with said application and that the same were duly considered by the Department of the Interior in relation [fol. 96] thereto and that upon due consideration thereof the Department of the Interior allowed said application and said homestead entry and held and determined that this plaintiff was then and there qualified to enter said lands and these defendants say that the Department of the Interior had full power, exclusive jurisdiction and authority to pass upon and determine the qualifications of this plaintiff to enter said land and that the said Department of the Interior held and determined said entry to be valid and that the same remained intact upon the records of the Department of Interior from about the 3rd day of March, 1902, until the cancellation thereof by reason of this defendant's contest on the — day of July, 1910, and these defendants say that during all of said time the above described lands were then and there segregated from the public Domain of the United States of America.

Wherefore these defendants say that the qualifications of this plaintiff to enter the land aforesaid under the entry aforesaid has been finally adjudicated and determined and that this court is without jurisdiction, power and authority to review the decision, adjudications and ruling of the Department of the Interior relative to plaintiff's qualifications to enter said lands and that this court is wholly without power, jurisdiction, right or authority to examine into, pass upon or determine in this action whether or not the plaintiff was entitled to make homestead entry No. 11185.

[fol. 97] Defendants for their other and further defense to plaintiff's second amended petition further say: that this plaintiff is in this action estopped from asserting the invalidity of said homestead entry No. 11185 in this to-wit; that on or about the 27th day of February, 1902, this plaintiff made and filed in the Department of Interior his application to enter the lands involved herein under the homestead laws of the United States and that upon consideration thereof the Department of the Interior which then and there had full and exclusive right, power, and authority to pass upon

and determine plaintiff's qualifications to enter the same and to pass upon and determine the sufficiency of plaintiff's application to enter same in due course of business allowed said entry which was then and there numbered 11185; and defendants say that upon the allowance thereof the lands herein effected became and was segregated from the public Domain of the United States of America and that said homestead entry at all times herein was held and determined by the Department of the Interior to be a valid homestead entry upon said lands and that said homestead entry remained intact upon the records of the Department of the Interior at all times from about the 3rd day of March, 1902, until the — day of ——, 19—.

Defendants further say that while said homestead entry #11185 was in force and effect and while intact upon the records of the Department of the Interior and while the lands aforesaid were segregated from the public Domain of the United States by reason thereof and on or about the 28th day of January, 1905, this defendant Seward K. Lowe, filed in the United States Land Office at [fol. 98] Woodward, Oklahoma, an affidavit of contest against plaintiff's homestead entry No. 11185 wherein and whereby this defendant alleged as the sole and only ground for the cancellation of said homestead entry #11185 that this plaintiff had wholly abandoned said land for a period of more than six months, next prior, to the commencement of said contest and that the defendant had failed to improve and cultivate the land as required by law, and as required by the rules and regulations of the Department of the Interior, and defendants say that upon the filing of said affidavit of contest that notice thereof was duly issued by the Department of the Interior and served upon this plaintiff and that a date of hearing was had thereon, and that at said hearing and at divers times therein testimony was taken in the Department of the Interior upon the charge and allegation in said affidavit of contest contained; and defendants say that in said contest proceedings and in hearings thereon and at all times therein from the commencement of said contest until about the year 1910 the plaintiff denied the allegations of this defendant's affidavit contest contained; and that plaintiff in said proceedings and in the submission of testimony upon said affidavit of contest at all times claimed and asserted that he, the said plaintiff, was fully complying with the homestead laws of the United States in the matter of residence upon and improvement of said lands in question, and that plaintiff as a witness in his own behalf testified in all of said hearings and submitted the testimony of other witnesses on his behalf and that in all of said hearings and proceedings evidence and testimony, the plaintiff asserted the validity of said homestead entry and that he, the said plaintiff, was in things [fol. 99] complying with the law and the duties encumbent upon him as said entryman under homestead entry No. 11185 and that he the said plaintiff was in all things complying with the law in relation thereto and in the matter of residing upon, cultivating and improving said lands under said homestead entry and these defendants say that said homestead entry was cancelled by the De-

partment of the Interior upon the sole and only ground that he, the plaintiff, had failed to comply with the law in the matter of residing upon, cultivating and improving said lands and defendants further say that in said contest proceedings this defendant, Seward K. Lowe, advanced and paid all the costs incurred in said contest case, and submitted testimony and procured witnesses whose testimony in said contest case then and there conclusively disclosed that the plaintiff had failed to reside upon, improve, and cultivate said lands as the law required under said homestead entry and defendants say that as a reward to him for securing and submitting said proof of non-compliance of the plaintiff in the matter aforesaid that the Department of the Interior awarded to the defendant a preference right to enter said lands under the homestead laws of the United States and defendants says that he exercised his preference right to enter said land under the homestead laws of the United States and that thereafter and on the 6th day of August, 1910, this defendant made homestead entry No. 021188 for said lands, and that he fully complied with the law relative to said homestead entry and that on July 19, 1917, the Department of the Interior issued to this defendant, Seward K. Lowe, the final certificate [fol. 100] entitled this defendant to a patent to said land that thereafter and on the 13th day of April, 1918, the Government of the United States executed and delivered a patent to said lands to this defendant, Seward K. Lowe, and that this defendant at all times has been and now — the owner of said lands under said patent and these defendants say that in all of said contest proceedings aforesaid the Department of the Interior was then and there invested with full right, power, jurisdiction and authority to entertain said contest proceedings and to cancel the homestead entry of this plaintiff by and through the information in said contest proceedings furnished by this defendant and that the Department of Interior had full right, power and authority to issue a patent to said lands to this defendant and these defendants say that at no time in said proceedings in the Department of the Interior had until the month of July, 1906, did this plaintiff take the position of or assert the invalidity of homestead entry No. 11185 and in this connection these defendants say that the allowances of homestead entry aforesaid was then and there made at the request and upon the application of this plaintiff and for his use, right and benefit and that the same was then and there beneficial to him and that the allowance of said entry segregated the said land from the public Domain of the United States and prevented other applicants from applying for or entering the same, and that this plaintiff at no time asserted the invalidity of said homestead entry of #11185 until it became apparent to him that said homestead entry was about to be cancelled by reason of contest of this defendant.

[fols. 101 & 102] Defendants say that they herewith deposit with the Clerk of this Court a full, true and correct exemplification of the records and books of the department of the Interior of the United States of America attested as required by law of the proceedings had in the Department of the Interior in the matter of plaintiff's home-

stead entry 11185 and the contest proceedings in the contest case of this defendant against this plaintiff together with all other proceedings in relation thereto and make the same a part and portion of this answer and that the same is for the purpose of identification marked Exhibit No. 1 but that owing to the bulky character of said records the same cannot be attached to this answer but reference to the same is herein named and the defendants desire that it be made a part or portion of their joint and several answer with the same force and effect as though attached hereto.

Wherefore premises considered defendants pray that the petition of this plaintiff be denied and the same dismissed and that the defendants have and recover all and from the plaintiff their costs in this action expended and for other and proper relief.

Swindall & Wybrant, Attorneys for the Defendants.

[File endorsement omitted.]

[fols. 103 & 104] In District Court of Beaver County

[Title omitted]

Reply

Comes now the plaintiff and for his reply to the defendants amended answer says, that he denies each and every averment of new matter in said answer contained.

And having fully replied plaintiff renews the prayer of his petition.

Dickson & Dickson, Attorneys for Plaintiff.

[File endorsement omitted.]

[fols. 105-231] In District Court of Beaver County

Affidavit of Alexander J. Dickson—Filed Apr. 11, 1922

State of Oklahoma,
Beaver County, ss:

I, Alexander J. Dickson, having heretofore, on the 2nd day of July 1906, made aplication to make a homestead entry of the S. ½, S. W. ¼, S. W. ¼, S. E. ¼, Section 15 and N. W. ¼, N. E. ¼, Section 22 in Township 5 North of Range 28 E. C. Meridian, subject to entry at Woodward Land Office under Section No. 2289 Revised Statutes of the United States and now having instituted suit to obtain title therefore do solemnly swear that I am a native born citizen of the United States, that I made actual setlement upon said

land and have cultivatd and resided upon said land, from the 2nd day of July 1906 until about the 1st day of May 1917, that no part of said land has been alienated, but that I claim to be the sole equitable thereof, that I will bear true allegiance to the Government of the United States, that I further swear that I have not heretofore perfected or abandoned on entry under the homestead laws of the United States, except I perfected homestead entry No. 509 in the Woodward Land Office at Woodward, Oklahoma, and thereafterwards made entry No. 11185 and afterwards sought to make entry referred to on July 2nd, 1906, for the same lands, upon the grounds that said entry No. 11185 was void.

Alexander J. Dickson.

Subscribed and sworn to before me this 23 day of April 1922. Jessie Keith Stewart, Court Clerk Beaver County, Oklahoma. (Seal.)

[File endorsement omitted.]

[fols. 232 & 233] In District Court of Beaver County

Statement of Evidence.

Exhibit in Evidence

Department of the Interior, United States Land Office

Woodward, O. T., Feb'y 12, 1907.

Hon. Commissioner G. L. O., Washington, D. C.

Sir: On July 2, 1906, Alexander J. Dickson of Gate O. T. applied to make entry of N. W. ¼ N. E. ¼ Sec. 22 and S. W. ¼ S. E. ¼ S. ½ S. W. ¼ Sec. 15, T. 5 N. R. 28 E. C. M. said application was rejected by this office for the reason that said applicant now has a homestead entry on said tract. From this action applicant files appeal. We have the honor to transmit all papers in the case herewith.

Very respectfully, —— ——, Register. E. S. Wiggins, Receiver.

[fol. 234] EXHIBIT IN EVIDENCE

In reply please refer to Woodward 021118 "H" E. N. Y. X-22. ENY. 021118 1 x. F. W. W.
Address only the Commissioner of the General Land Office.

Department of the Interior, General Land Office

ALEXANDER J. DICKSON

v.

S. K. LOW

Declining to Forward Application for Writ of Certiorari

Washington, March 13, 1911.

Register and Receiver, Woodward, Oklahoma.

SIRS: May 22, 1894, Alexander J. Dickson made H. E. No. 509 for the W. ½ S. W. ¼ and W. ½ N. W. ¼ Sec. 15, T. 28 No. R. 25 W., and on December 28, 1899, made final proof and received F. C. No. 509, upon his paying the purchase price of one dollar per acre, as provided by the act of March 3, 1893, (27 Stat., 612); the land having been patented to the entryman April 21, 1900.

On March 3, 1902, Dickson was allowed to make a second H. E. No. 11185 for S. W. ¼ S. E. ¼, S. ½ S. W. ¼ Sec. 15, and N. W. ¼ N. E. ¼ Sec. 22, T. 5 N., R. 28 E.

On March 6, 1902, your office notified Dickson that his second entry had been erroneously allowed, he having exhausted his home-[fol. 235] stead right, and that this office would, undoubtedly holds the second entry for cancellation; that he was privileged to relinquish such entry and make application for repayment of the fees and commissions. No reply was made by Dickson to said communication.

January 28, 1905, S. K. Lowe filed contest affidavit against said entry charging abandonment, upon which a hearing was had, the parties appearing and submitting testimony, upon which you rendered decision recommending cancellation of said H. E. No. 011185.

On July 2, 1906, Dickson filed application to take second homestead entry for the land covered by his said entry No. 11185, stating he had been advised that his second entry aforesaid was void, and that he was entitled to make another entry under the act of May 22, 1902 (32 Stat. 203). This application you rejected for conflict with Dickson's H. E. 11185.

Dickson appealed from your adverse decision and order denying the application of July 2, 1906; whereupon by letter "H" of July 8, 1907, Dickson's entry 11185 was held for cancellation under the Lowe contest; it having been also held that Dickson's entry was validated by the act of May 22, 1902. This decision was affirmed by the Department February 13, 1908, but on September 8, 1908, the Secretary ordered a rehearing of the case which was had, when

your, this office and the Department rendered concurring decisions [fol. 236] adverse to Dickson, and whose second entry was cancelled by letter "H" July 30, 1910.

August 5, 1910, Lowe made H. E. No. 021118 for the lands last hereinbefore described.

September 3, 1910, Dickson filed affidavit of contest against the Lowe entry, alleging the facts with reference to the allowance of his second entry, its cancellation, entry of the land by Lowe, and that the latter acquired no preference right of entry for the reason that, in his contest, he had not charged that the second entry was void on account of disqualification, and that such matter was not brought to issue on the trials of the contest, and further that as he had not furnished evidence sufficient to have warranted cancellation, Lowe acquired no preference right, and that, as Dickson was a settler on the land at the time his second entry was cancelled his rights were superior to that of Lowe.

You rejected the affidavit of contest on the ground that the charges made were not deemed sufficient to warrant a hearing, from which action Dickson appealed.

By letter "H" October 25, 1910, your rejection of the Dickson affidavit of contest was affirmed, it having been held that the matters alleged in the affidavit had been fully considered and decided adversely by letter "H" of July 8, 1907, and the departmental decision of February 13, 1908. That the proceeding savored strongly [fol. 237] of an attempt to prolong the litigation; the matters set up in the present affidavit having been adjudicated; in view of which the contest affidavit was rejected and the case closed as to Dickson.

With letter of January 10, 1911, you transmitted proof of service of letter "H" of October 25, 1910, November 11, 1910, together with an application filed by Dickson, December 16, 1910, addressed to the Secretary, in effect an application for writ of certiorari, asking a stay of proceedings, and that the record be transmitted to the Department for review of the decisions rejecting the contest affidavit, and denying the contestant the right of appeal; specifically denying that there had been any adjudicated of the matters raised by the rejected affidavit.

An no appeal has been filed by Dickson from the action of this office on October 25, 1910, there is no foundation for the present application; this office declines to forward the same to the Department, and the case remains closed, of which you will notify the parties.

Respectfully, S. V. Proudfit, Assistant Commissioner. Board of Law Review, by Julius Andree.

[fol. 238] EXHIBIT IN EVIDENCE

"H." Woodward 021188. X-34.

J. H. D. 2 Ex. 021188.

Department of the Interior, General Land Office

ALEXANDER J. DICKSON

v.

S. K. LOWE

Contest Affidavit Rejected. Case Closed

Washington, October 28, 1910.

Register and Receiver, Woodward, Okla.

SIRS: May 22, 1894, Alexander J. Dickson made homestead entry for W. ½, S. W. ¼ & W. ½, N. W. ¼ Sec. 15, T. 28 N., R. 25 W.

December 28, 1899 he made final five year proof, upon which F. C. No. 509 issued upon his paying the purchase price of one dollar per acre, as provided by Act of March 3, 1893; 27 Stat. 612. under which the land was thrown open to settlement and entry.

The said entry patented April 21, 1900.

On March 3, 1902, Dickson was allowed to make a second homestead entry No. 11185 for S. W. ¼, S. E. ¼, S. ½, S. W. ¼, Sec. 15, and N. W. ¼, N. E. ¼, Sec. 22, T. 5 N. R. 28 E.

On March 6, 1902, your office notified Dickson that his entry had been erroneously allowed, he having exhausted his homestead right, and that this office would undoubtedly hold his entry for cancellation, that if he desired he could relinquish his second entry and make application for return of the fees and commissions. No reply [fol. 239] was made by Dickson to said communication.

On January 28, 1905, S. K. Lowe filed contest affidavit against said second entry charging abandonment.

The case coming on to be heard on May 3, 1905, both parties appeared and submitted testimony upon which you rendered your decision finding that the charges had been sustained and you recommended the cancellation of the entry.

On July 2, 1906 Dickson filed an application to make a second homestead entry for the land covered by his H. E. No. 11185, stating that he had been advised that his second entry was void and that he was entitled to make another one, under act of May 22, 1902, 32 Stat. 203. You rejected the application filed July 2, 1906, for conflict with Dickson's second entry.

The latter appealed from your decision recommending the cancellation of his entry under the contest proceedings, and also from the rejection of his application filed July 2, 1906.

By office letter "H" of July 8, 1907, Dickson's entry was held for cancellation as the result of Lowe's contest. It was further held that Dickson's entry was validated by the Act of May 22, 1902, under certain departmental decisions which were cited.

The Secretary, on February 13, 1908, affirmed the decision of this office, holding Dickson's entry for cancellation. It was urged by Dickson that his entry when made, was invalid, and he should have been allowed to perfect his said application filed on July 2, [fol. 240] 1906.

Upon such question the Secretary said in his decision:

That his second entry of March 3, 1902, became good on the passage of the act of May 22, 1902, is clear from the decision cited by your (this) office. Having a record entry which he was asserting, the act granting a second right, in the absence of any adverse right, cured all infirmity of the entry at its initiation.

Upon the application of Dickson a rehearing was ordered in the contest case by the Secretary on September 8, 1908. Such rehearing was had and your office, this office and the Department rendered concurring decisions adverse to Dickson, whose entry was finally cancelled by office letter "H" of July 30, 1910.

On August 5, 1910, Lowe made homestead entry No. 021188 for the land.

On September 3, 1910, Dickson filed affidavit of contest against Lowe in which he set up the facts in relation to his first entry and the one made by him on March 3, 1902. It was further alleged that his second entry was erroneously allowed, he, Dickson, being a disqualified homesteader and hence his entry was void; that he had been notified by your office on March 6, 1902, of the erroneous allowance of his application; that in the month of December, 1902, he went upon the land and established his residence thereon and had since continued to reside upon and improve the same; that his application of July 2, 1906, to re-inter the land had been rejected; that Lowe had, through contest, procured the cancellation of his entry on July 30, 1910; that Lowe had not charged that his, [ol. 241] Dickson's second entry was void on account of disqualification and the matter was not brought in issue in the trials of the contest; that Lowe was not entitled to a preference right, he not having furnished evidence upon which to cancel a valid existing entry; that affiant's H. E. No. 11185 was void ab initio, did not segregate the land and the order of cancellation was nugatory; that his, Dickson's rights attached on account of his being a settler upon the land.

You rejected Dickson's contest affidavit on the ground that the charges made were not deemed sufficient to warrant the ordering of a hearing and from such action he appealed.

The alleged invalidity of Dickson's second entry, as set up in the affidavit of protest, was fully considered and decided adversely to him in said letter "H" of July 8, 1907; and said departmental decision of February 13, 1908, as before set forth.

Dickson's contest affidavit savors strongly of an attempt to prolong litigation. The matters set up by him having been adjudi-

cated, the same will not be the basis of a hearing, being res adjudicata.

Dickson's entry was regularly cancelled as the result of a contest charging abandonment, and the fact of his being a settler on the [fols. 242-243] land at the time of cancellation would not defeat the preference right of Lowe.

In view of such prior adjudication the contest affidavit is hereby rejected and case closed as to Dickson.

Advise the parties in interest hereof.

Respectfully, —— ——, Assistant Commissioner.

[fol. 247] In District Court of Beaver County

[Title omitted]

Order Overruling Demurrer to Second Amended Petition—Filed June 27, 1922

Now, on this 20th day of December, 1920, said District Court, being then and there duly in session, the above numbered and styled cause came on in its regular order to be heard by the court upon the demurrer of the defendants to the petition of said plaintiff, the plaintiff appearing by Dickson & Dickson, his attorneys, and the defendants appearing by C. W. Herod and Swindal & Wybrant, their attorneys, and the court having heard the argument of counsel in favor of and against said demurrer, finds that said demurrer is not well taken and should be denied, refused and over-ruled.

It is, therefore, considered, ordered and adjudged by the court, that the demurrer of the Defendants, Seward K. Lowe and Susan Lowe, to the second amended and supplemental petition of said plaintiff be and the same is hereby in all things denied, refused and over-ruled, to which said findings order and ruling of the court the defendants and each of them at the time excepted and saved an exception.

And, thereupon the defendants, in open court asked the court for sixty days within which to answer said Petition, and there being [fols. 248-270] no objection, it is ordered by the court that said defendants be and they are hereby allowed sixty days within which to file their answer to the second amended and supplemental petition of said plaintiff.

Arthur G. Sutton, Judge.

O. K. Dickson & Dickson, Attorneys for Plaintiff. Swindall & Wybrant, Attorneys, for Defendants.

[File endorsement omitted.]

[fol. 271] IN SUPREME COURT OF OKLAHOMA

JUDGMENT—Filed Dec. 9, 1924

Be it remembered, that on this Dec. 9, 1924, Supreme Court convened pursuant to adjournment of Dec. 2, 1924.

Present: N. E. McNeill, Chief Justice: J. T. Johnson, G. M. Nicholson, F. L. Warren, C. W. Mason, and J. H. Gordon, Associate Justices; W. M. Franklin, Clerk, and P. S. Hillman, Marshal.

Public proclamation of the opening of court having been made for the transaction of such business as might properly come before it, the following proceedings were had, to-wit:

14001

S. K. LOWE et al.

vs.

A. J. DICKSON

Opinion by Gordon, J.

And now on this day the above cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed.

[fol. 272] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 14001

SEWARD K. LOWE and SUSAN LOWE, Plaintiffs in Error,

vs.

ALEXANDER J. DICKSON, Defendant in Error

OPINION—Filed Dec. 9, 1924

Syllabus

I. Where an application for homestead entry upon the lands of the United States is made by one who, under existing laws of the United States is disqualified from making such application, the same is void.

II. An application for homestead entry upon the lands of the United States which is void when made, is not rendered valid by a subsequent law removing the disqualification of the applicant.

III. Where the application for homestead entry and the records of the Land Office disclose upon their face that such application is void, the land covered thereby is not segregated nor withdrawn from settlement by reason of such void application.

IV. The fact that one has entered upon and is holding lands of the United States underhomestead application which is void upon its face does not authorize a contest upon the ground of failure to cultivate, and one instituting such contest obtains no preferential right thereby.

V. The principal is well settled that where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner and compel him to convey the legal title. Prosser v. Finn, 208 U. S. 67.

[fol. 273] Error from District Court of Beaver County

Hon. Arthur G. Sutton, Judge

O. C. Wybrant, C. W. Herrod, S. A. Horton, for plaintiffs in error.

Homer N. Boardman, Dickson & Dickson, for defendant in error.

Affirmed

[fol. 274] Gordon, J.:

This action was begun in the district court of Beaver County, by defendant in error against plaintiffs in error, for the purpose of recovering certain lands in that county, together with the usable value thereof, from and after the 17 day of July, 1917. The parties will be designated as in the trial court.

Plaintiff claims in his petition to be the equitable owner of the said land by reason of the following state of facts:

That on the 2nd day of July, 1906, said tract of land was public land of the United States, subject to homestead entry, unappropriated and without any legal entry thereon; that plaintiff being duly qualified, did make and present to the Register and Receiver of the United States Land Office at Woodward, Oklahoma, his homestead application therefor under the laws of the United States, and did all the things necessary to constitute a proper application. But that said Register, instead of allowing said application, did wrongfully reject the same for the sole reason that said land was covered by the homestead entry of plaintiff made by plaintiff on March 3, 1902, being homestead entry No. 11185. But plaintiff says that said former entry, No. 11185, was void and its invalidity appeared upon the face of the entry paper and upon the face of the record

kept by said Register and Receiver. In explanation of this void entry, plaintiff charges that on May 22, 1894, he made homestead entry No. 509, at said land office, for certain other lands in Woodward County, and on May 28, 1899, he made five year final proof [fol. 275] under said entry and received final certificate No. 509, and that patent was issued therefor on April 21, 1900. Plaintiff says that by reason of this fact, he was disqualified on March 3, 1902, to make homestead entry on the tract involved here. It is alleged that on February 27, 1902, plaintiff executed homestead application to enter the land involved here, before the Probate Judge of Beaver County, and caused same to be forwarded to the land office at Woodward; that said application was received at Woodward, on March 3, 1902; that in said application he set forth the fact that he had theretofore made homestead entry No. 509, and had made final proof thereon and had received patent on April 21, 1900; that when the Register received application No. 11185, he endorsed on the proper contest docket a notation, showing the fact as to entry No. 509, and reciting notice to plaintiff, and on March 13, 1902, entry was made on the same docket showing receipt of notice. Plaintiff states that in attempting to make entry No. 11185, he acted in good faith, believing at the time that his right to make the second homestead entry had been restored by law. It is further pleaded that plaintiff, on March 13, 1902, received notice from the Register showing that entry No. 11185, was erroneous by reason of the former entry and that application for return of fees might be made. Plaintiff took no action under this notice. When he made his application on July 2, 1906, same was rejected on the ground that it was in conflict with homestead entry No. 11185. Plaintiff says that he was, on July 2, 1906, qualified to make homestead entry for said land, because on May 22, 1902, Congress passed an Act by virtue of which plaintiff's disqualifications were removed. It is alleged that from the action [fol. 276] of the Register and Receiver of the said office in rejecting this application, appeals were taken, finally reaching the Secretary of the Interior, who affirmed the original decision; that thereafter, a rehearing was had upon an original affidavit of contest, upon which hearing, the Register recommended the cancellation of said entry upon the ground of abandonment. The petition then sets out at length the various appeals from this ruling and its affirmance, and further alleges that on January 28, 1905, the defendant, Seward K. Lowe, filed in the land office at Woodward, a pretended affidavit of contest against plaintiff, charging abandonment of entry No. 11185, and failure to cultivate and improve as required by law. That said contest was unlawfully entertained and recommendation made by the Register that said entry be cancelled. This decision was finally affirmed by the Secretary of the Interior. It is alleged in substance that all the contest proceedings were of no effect for the reason that they were aimed at the entry of March 3, 1902, which was void, and the invalidity was apparent of record. It is therefore alleged, that all of the actions of the land department in entertaining such a contest and in refusing to allow plaintiff's entry of July 2, 1906, were error as to a pure and unmixed question of

law. That in view of the fact that plaintiff was legally entitled to enter said tract, under his application of July 2, 1906, and was the first legal applicant to make entry thereon, and said Lowe was not entitled to contest the illegal entry of March 3, 1902, which had been immediately suspended and rejected, and said Lowe was, under said illegal contest, awarded the preference right to enter said land, he was not entitled to make said contest or entry. Plaintiff alleges that defendant Lowe did, on August 6, 1910, make homestead entry [fol. 277] to the lands involved here, and, on July 19, 1917, did receive final certificate thereto, and thereafter, on April 13, 1918, patent issued to him. For the reasons stated, plaintiff claims that defendant, Seward K. Lowe, is holding title as trustee for him and prays a decree so adjudging and further a decree directing conveyance of said land by defendant to him. There is also prayer for recovery of the usable value of the land from the time plaintiff was deprived of possession thereof.

Defendants in their answer admit that patent to the land in controversy was issued and delivered to Lowe on April 13, 1918. They further say that on February 27, 1902, this land was owned by the United States and was vacant and unappropriated and open to entry; that on said date, plaintiff made application to enter upon same on March 3, 1902, application was allowed by the Department of the Interior; that the question of plaintiff's qualification to enter was presented in connection with the application and it was held that plaintiff was qualified to enter and that such entry remained intact upon the record until cancellation thereof by the Interior Department on the 6th day of August, 1910. Defendants say that this question having been adjudicated by the Interior Department, this court is without jurisdiction to determine such question in this action. Defendant pleaded estoppel against the assertion of the invalidity of this entry because of the application and its allowance by the Department. They say that while this entry was in force, defendant Lowe, on January 28, 1905, filed in the land office at Woodward, an affidavit of contest against said entry upon the ground of abandonment and failure to improve and cultivate. That plaintiff joined issue upon these allegations and asserted that he was fully complying with the law. That said entry was cancelled by [fol. 278] the Interior Department upon the ground that plaintiff had failed to comply with the law and that defendant was awarded the preference right to enter and on August 6, 1910, defendant made entry No. 021188 for said land and complied with the law so that the patent was issued to him. Defendant says that it was not until July, 1906, that plaintiff asserted the invalidity of his entry No. 11185, when it became apparent that the Department would cancel said entry. In his reply, plaintiff denies generally the allegations of the answer.

The case was tried to the court; that was judgment for plaintiff declaring the defendant to be holding the land as trustee for plaintiff and rendering judgment for the usable value of the land for the several years during which it had been held by defendant Lowe.

Due exceptions were saved and upon the overruling of a motion for new trial, the cause was appealed to this court.

While there are eight assignments of error, we are of opinion that these various assignments present in different ways the few questions involved here. The questions to be decided are:

1st. Whether plaintiff's alleged entry No. 11185, was void with its invalidity appearing upon the face of the record.

2nd. If this entry No. 11185 was void at the time it was made, was it rendered valid by the continued holding of the plaintiff thereunder after the passage of the Act of May 22, 1902, which rendered plaintiff qualified to make the entry.

3rd. Did the successful prosecution of the contest by the defendant create in his favor a preferential right of entry upon the land, admitting that plaintiff's entry was originally void upon its face.

Other questions are urged, to-wit, claim of estoppel against the plaintiff; the assertion by the defendant of laches and that the judgment for the usable value was not warranted by the evidence, but these latter questions are not, as we view it, of serious importance here, though they will, of course, be passed upon.

[fol. 279] In considering these questions we find that when plaintiff attempted to make this entry No. 11185, he had already exhausted his rights under existing laws, and was precluded from making this entry by such existing law and the fact of his former entry and the fact that the same had been paid out and that the manner and time of such payment were of record in the land office. Under the rules governing such entry the applicant was required to file with his application an affidavit showing his qualification to make the entry. This he did, setting out the full description of his former entry. The Land Department takes judicial notice of its records. Lighter v. Hodges, 3 L. D. 193; Ward's Heirs v. Laborraque, 22 L. D. 229. The local land office took the view that the entry was void and so advised the applicant. No other conclusion could have been reached. The attempted entry was void, not by reason of any concealed disability on the part of the applicant, but by reason of the facts as they appear of record. It must follow that the land involved was not thereby withdrawn from further appropriation. See case of David Phitz, 3 L. D. 181; Wilcox v. Jackson, 13, Peters, 498. The defendant Lowe was at Liberty after this attempted entry to apply for entry upon the land. It is evident that if the entry of Dickson was void and if he obtained no rights thereby, there was no room for a contest on the ground of abandonment, Yet, out of such a contest arises the right of defendants here, if any they have. The Department, in finally passing upon the contest, realized this difficulty. In the opinion, finding in favor of contestant on appeal, the Department says:

"You held the fact and regularity of the alleged appeal of July 10, 1906, and the original invalidity of the second entry (made March 3, 1902) were immaterial questions, because Dickson's continued assertion of right under his second entry (which has ref-
[fol. 280] erence to his entry of March 3, 1902) after the passage of the Act of May 22, above, cured the entry and made it valid, citing Smith v. Taylor (23 L. D. 440); Geo. W. Blackwell, (11 L. D. 384); John J. Stewart (9 L. D. 443)."

And further,

"That his second entry of March 3, 1902, became good on passage of the Act of May 22, 1902, is clear upon the decisions cited by your office. Having a record entry which he was asserting, the Act granting a second right, in absence of any adverse right, cured all the infirmity of the entry at its initiation."

This brings us to the question submitted by the above quotation, which is, whether the original void entry was validated by a subsequent Act which would render the plaintiff qualified to make the entry. The holding of the Department that the original void entry was so validated is supported by a number of decisions of the land Department and some of them are cited in the matters above quoted. These opinions are entitled to great weight and should not be overruled except for cogent reasons and unless it be clear that such construction is erroneous. United States v. Johnson, 128 U. S. 31 L. ed. 389. But a different conclusion has been reached by the Supreme Court of the United States in the case of Prosser v. Finn, 208 U. S. 67, 52 L. ed. 392, and the law as laid down in that case is binding upon us here. In that case, Prosser, who was a special agent of the general land office, had made a timber-culture entry for the land involved and under this entry had gone upon the land, planted trees and improved the land at great labor and expense. At the time of making his entry, the law in force prohibited employes of the Land Department from making such entry upon the public domain. Prosser had been advised by officials of the Land Department, that he, as special agent, did not come within the inhibition contained in the laws. More than five years after such entry, an affidavit of contest was filed embracing the charge that Prosser's entry was in violation of law. The relief sought was the cancella-
[fol. 281] tion of the entry and its forfeiture to the United States. This contest was finally sustained by the Interior Department and patent was issued to a third party who made entry. Prosser began his action to have the holder of the patent declared to hold the land as trustee for his benefit. Prosser claimed in his petition that while his original entry was void, by reason of the fact that he was an employe of the Department, yet, he had made the entry upon the special advice of the Commissioner of the Land Office, advising that he was not regarded as coming within the terms of the word "employe"; that he had at great expense cultivated the land, and planted trees thereon, and that while he was in possession of the land, and long prior to the institution of any contest he had ceased to be a

special agent of the general land office or to have any connection with the Land Department. His claim was, that having continued to occupy the land and to cultivate the same after he was in possession and authorized under the law to make a valid entry and this state of affairs being in existence before any contest was begun, his former entry became by these facts validated. Patent had been issued to Finn by the Department after the decision of the contest and the cancellation of Prosser's entry. In the opinion in this cause, it is said by the court on page 395 of the citation from the Law edition:

"The principal is well settled that where "One party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner and compel him to convey the legal title." Stark v. Starr, 6 Wall., 402, 419, 18 L. ed. 925, 930; Silver v. Ladd, 7 Wall., 219, 19 L. ed. 138; Cornelius v. Wessel, 128 U. S. 461, 32 L. ed. 484, 9 Sup. Ct. Rep. 122, Bernier v. Bernier, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244; Re. Emblem, 161 U. S. 52, 40 L. ed. 613, 16 Sup. Ct. Rep. 487."

And further on page 396:

"The law as we now recognize it to be, was the law when the [fol. 282] plaintiff entered the lands in question, and, being at the time an employee in the Land Office, he could not acquire an interest in the lands that would prevent the government, by its proper officer or department, from canceling his entry and treating the lands as public lands which could be patented to others. It may be well to add that the plaintiff's continuing in possession after he ceased to be special agent was not equivalent to a new entry. His rights must be determined by the validity of the original entry at the time it was made."

We think a careful analysis of that case discloses that it disposes of practically all the questions in the case before us here. In the case we are now considering the contest was based upon abandonment and failure to cultivate.

In order to justify such a contest, it was necessary that it be predicated upon a valid entry or at least upon an entry so far valid as to effect a withdrawal of the land from public appropriation. To do this, the Department held in consonance with its former holding that a continuance of the occupancy under the original entry after the disability had been removed, validated the original entry. Such holding is expressly disapproved and the contrary is held in the Prosser case supra. This question was fully argued in that case, as appears from the brief on plaintiff in error, citing the various decisions of the Land Department upon that point. This is a pure and unmixed question of law and the right of plaintiff in error to maintain his action in the manner and for the purpose of declaring the trust, is affirmed in the Prosser case. In the case before us, the

matter of the hardship upon the defendants who have spent their money upon the contest proceeding, and after long litigation bitterly contested by plaintiff, have been issued a patent and have occupied the land for a number of years, is urged. And it is further urged that by attempting to refute the allegations of the contestant and by [fol. 283] insisting upon his right to hold the land under his original entry, plaintiff is estopped to deny the validity of his original entry, and is estopped to claim under his application of July 2nd, 1906.

As to both of these matters it may be well to quote the expression of Mr. Justice Harlan in the Prosser case supra, as found on page 394 of the citation from the Law edition:

"A great hardship has been done the contestee in this case, because we have no doubt he was led to make this entry upon the authority of the letter before referred to; but, holding to the doctrine that special agents come within the inhibitions of par. 452 of the Revised Statutes, we are unable to afford him the relief we would desire to give. We therefore hold that said timber-culture entry was void in its inception and recommend its cancel-ation."

We know of no way by which plaintiff may have estopped himself to set up the invalidity of his attempted entry of March 3, 1902, unless it be by some deceitful conduct or some misrepresentation that has misled the defendant to his disadvantage as to the facts. But it appears that early in the contest proceeding, plaintiff was asserting his right under his attempted entry of July 2nd, 1906, and asserting that his entry of March 1902, was void. This matter was decided against plaintiff upon appeal and decided upon the erroneous theory that his original void entry had been subsequently validated. The facts surrounding this matter were well known to all of the parties involved and were apparent of record, of which record, the defendant, Lowe, was bound to take notice. Again, it is urged, that plaintiff has been guilty of such laches as should bar this action. We are unable to so find. Plaintiff occupied the land under his claim until the year 1917. This action was begun on July 19, 1917; defendant received his final certificate on July 19, 1917. We are therefore of opinion that the original entry of March 3, 1902, was void, and following the law, as announced in Prosser v. Finn, supra, that this [fol. 284] void entry was not therefore validated by the continued possession of the land thereunder after he had become qualified by law to make a valid entry, and that the holding of the Department that such void entry was thereafter validated was error. It follows that in July, 1906, the land was open for entry.

We have examined the authorities upon this proposition, to which plaintiffs in error have called our attention in their brief. The case of Hodges v. Colcord, 193 U. S. 48 L. ed. 677, is authority for the proposition that an entry prima facie valid, withdraws the land covered thereby from further entry so long as such entry remains uncanceled. And this is said in the opinion to be the holding of the Land Department. The distinction between entries void upon the

face thereof, and those prima facie valid, is discussed, and it is upon this distinction that the judgment in the case appears to be based. In the case of Hastings & Dakota R. Co. v. Whitney, 132, U. S. 33 L. ed. 363, the contention was made that the entry was void on its face, but in this opinion it was held that such was not the fact. On page 366, Law ed. it is said:

"We do not think this contention can be maintained. Under the Homestead Law three things are needed to be done in order to constitute an entry on public lands; first, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application, and third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed, and delivered to him, the entry is made — the land entered. If either one of these integral parts of an entry is defective, that is, if the affidavit be insufficient in its showing, or if the application itself is informal, or if the payment is not made in actual cash, the register and receiver are justified in rejecting the application. But if, notwithstanding these defects, the application is allowed by the land officers, and a certificate of entry is delivered to the applicant, and the entry is made of record, such entry may be afterwards cancelled on account of these defects by the commissioner, or on appeal by the Secretary of the Interior; or, as is often the practice, the entry may be suspended, a hearing ordered, and the party notified to show by supplemental proof a full compliance with the requirements of the Department; and on failure to do so the entry may then be canceled. [fol. 285] But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity."

The first requisite, as above prescribed, is that the applicant must make an affidavit, setting forth the facts which entitle him to make such entry. In the case before us, the affidavit and the record show the applicant not entitled to entry. It is not a case where there is merely a defect in the affidavit, either as to form or substance, but the affidavit and the record in themselves deny the right to entry and it was so considered by the local Land Office. The case of McMichael v. Murphy, 197 U. S. 49 L. ed. 766, involves an entry valid on its face and the opinion fails to draw a distinction between such entries and those void upon their face. The remaining cases cited by plaintiffs in error appear to involve the same question of an entry prima facie valid. In the case here, the Department has predicated the right of the contest upon the fact, not that the original entry against which the contest was instituted was valid in its inception, or even prima facie valid, but upon the sole theory that it, while void in its inception, was subsequently validated by the Act of Congress removing the disqualification of the entryman, and this, as we have seen, according to the decision in Prosser v. Finn, supra, was error. If we are right in our holding that the entry in the case before us was void upon its face, then the authorities cited by plaintiffs in error upon this question are not in point. The form of action here is the usual action adopted to test the rights of one claiming the equitable

title as against a holder of the record legal title. Plaintiff made proper tender of his application to enter on July 2, 1903. It is not claimed that he failed in any of the essential elements of such application. The adjudication of the questions involved is not a substitution of the court for the Land Office, but involves the question whether or not the Department erred in a pure matter of law. [fol. 286] See Hemmer v. United States, 204 Fed. 898; James v. Germania Iron Co. 107 Fed. 597. We recognize that the facts, as found by the Department, are controlling upon the court. The evidence is practically contained in the pleadings, except upon the question of the usable value of the land. Upon this point, there seems to have been little controversy at the trial in the court below. The evidence upon this question is sufficient to sustain the judgment of the court. It is our conclusion, therefore, that the trial court did not err in overruling defendant's demurrer to plaintiff's petition, and that there was no error in the judgment of the trial court. The judgment of the trial court is therefore, in all things, affirmed.

McNeill, C. J., Johnson, Branson, Lydick and Warren, JJ., concur.

[fols. 287-294] Petition for rehearing, covering 8 pages, filed December 29, 1924, omitted from this print.

[fols. 295-313] In Supreme Court of Oklahoma

Order Denying Petition for Rehearing—Filed April 7, 1925

[Title omitted]

And now on this day it is ordered by the Court that the petition for rehearing filed in the above cause be, and the same is hereby, denied.

[fol. 314] In Supreme Court of Oklahoma

Clerk's Certificate

I, Wm. M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 319 pages, numbered from 1 to 313 inclusive, is a true and complete transcript of the record and proceedings in said Supreme Court in the case of Seward K. Lowe and Susan Lowe, plaintiffs in error, vs. Alexander J. Dickson, defendant in error, Number 14,001, as shown by the files and record of the Supreme Court of the State of Oklahoma.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Oklahoma City, this the 17th day of June, A. D. 1925.

Wm. M. Franklin, Clerk of the Supreme Court of Oklahoma.
(Seal Supreme Court, State of Oklahoma.)

[fol. 315] In Supreme Court of the United States, October Term, 1925

Assignments of Error and Statement of Points to be Relied Upon, and Designation by Petitioners of Parts of Record to be Printed, with Notice and Proof of Service—Filed July 16, 1925

To the Hon. Warren K. Snyder, counsel for the respondent, Alexander J. Dickson in cause No. 580, entitled Seward K. Lowe and Susan Lowe, petitioners, vs. Alexander J. Dickson, respondent:

I hand you herewith a copy of the points of law that will be presented to the Supreme Court of the United States in support of the claim of the petitioners; and also the parts of the record which we deem necessary to present the matter fully to the Supreme Court of the United States. Of this, you will take due notice.

S. A. Horton, Counsel for the Petitioners.

As attorney for the Respondent, Alexander J. Dickson, I hereby accept service of a copy of the points of law and parts of the record which petitioners have designated as the points of law they desire to present and the parts of the record which they deem important and necessary to print.

Signed at Oklahoma City, Oklahoma, on this the 11 day of July, 1925.

Warren K. Snyder, Counsel for the Respondent, Alexander J. Dickson.

[fol. 316] Assignments of Error and Points of Law Which Seward K. Lowe and Susan Lowe Desire to Present to the Supreme Court of the United States in the Above Numbered and Entitled Cause and Parts of the Record Which These Petitioners Regard as Necessary and Proper to be Printed in Order That These Points May be Presented to the Supreme Court of the United States.

Assignments

First. The Supreme Court of the State of Oklahoma erred in holding that the second amended and supplemental petition with exhibits thereto attached, stated a cause of action in favor of Alexander J. Dickson and against the Petitioners, Seward K. Lowe and Susan Lowe.

Second. The Supreme Court of Oklahoma should have held that the second amended and supplemental petition not only failed to show a cause of action, but affirmatively showed that the judgment and findings should have been in favor of the petitioners, Seward K. Lowe and Susan Lowe.

Specific Points of Law Presented

Third. Where an application is tendered to the proper land office and is received by the proper land office and a certificate of entry issued covering public land of the United States, and it appears that the entryman was disqualified because he had already filed upon 160 acres of land, but before any adverse rights attach, this disqualification is removed, that removes the disability and validates the entry.

Fourth. That at the time the application was made in the case at bar, there was a valid rule of the department in force which prevented the filing of any additional application until all of those which were [fol. 317] already filed had been canceled; and on July 2, 1906, at the time the application of the Respondent was tendered he, the respondent, had an uncanceled entry of record which he was asserting; and therefore, the department did not commit an error of law in refusing to file his entry of July 2, 1906, but it was rightfully refused and therefore no right accrued to the Respondent by the tendering of the same.

Fifth. That no rights can be acquired by tendering to the Department of the Interior or the Land Office, an application to file under the Homestead Laws of the United States where such application is rejected by the proper land office.

Sixth. That no rights can be acquired under the Homestead provisions of the Laws of the United States which govern this proceeding, without a five-year occupancy of said land by the homesteader, which occupation cannot begin until the homesteader has a filing in the proper land office; and the respondent contending that he never had a filing in the proper land office, therefore he has never occupied the land according to his contention, and therefore has no rights that can be asserted in this case; and the judgment, therefore must be for the Petitioners.

Seventh. That in a suit to declare a resulting trust such as we have in the case at bar, the court cannot receive evidence of cultivation, occupancy and other requirements necessary to be shown before a patent can issue. Such proof must be presented to the proper land office, the land department being the department of the government specifically authorized to determine such questions of fact; and the court cannot be substituted for the department.

Eighth. That in a suit to declare a resulting trust, where the petition shows that the plaintiff is seeking to have the court hear and

determine his final proof as provided for Under Section 2289, 2290 and 2291 of the Revised Statutes of the United States and Section 1 of the Act of March 3, 1877 and Section 1 of the Act of March 3, 1879, the petition clearly shows that the court is without jurisdiction or authority to entertain the petition. This is especially true in the absence of an allegation that this proof and affidavit had been tendered to the proper departmental officers and by them rejected.

Ninth. That where public land of the United States is subject to be disposed of in the proceedings wherein the application is made and an application is presented to the proper land office and the land office entertains said application, files the same and issues a certificate of entry, the land is withdrawn from the public domain of the United States; and the mere fact that the entryman may be disqualified does not change the rule, for the entry is not void, but [fol. 318] merely voidable.

Tenth. Where an applicant makes proper affidavits under the homestead laws of the United States to enter upon the public land, and his application is received and a certificate of entry is issued, even though erroneously by reason of the fact that the records of the land office showed that he had already exhausted his rights and therefore was a disqualified entryman, still where that disqualification was removed before any adverse rights intervened, this would validate his entry unless he was disqualified under Section 452 of the Revised Statutes of the United States, which prohibits employes of the Land Office from becoming interested in the public lands of the United States.

Parts of the Record Necessary to be Printed in Order to Present the Foregoing Legal Points

1. Second amended and supplemental petition, with exhibits attached, pages 29 to 83 of the Certified Copy of the Record on file with the Clerk of the Supreme Court of the United States.

2. Demurrer to the second amended and upplemental petition, record 85.

3. Trial court's ruling on the demurrer, records 247 and 248.

4. Defendant's amended answer, record 94 to 101.

5. Reply, Record 103.

6. Affidavit of Allegiance, Records 104 and 105.

7. Order rejecting the application of July 2, 1906, Record 232.

8. Opinion of the Department declining to file the application. Record 234, 235, 236 and 237.

9. Opinion rejecting the contest affidavit filed by Alexander J. Dickson, the Respondent, seeking to contest the entry of Seward K. Lowe. Records 238 to 242.

10. Order of the Supreme Court of Oklahoma affirming the judgment of the trial court. Record 272.

11. Opinion of the Supreme Court of Oklahoma affirming the judgment of the trial court. Record 272 to 286.

12 Petition for re-hearing. Record, —.

13. Order denying petition for rehearing, dated April 7, 1925. Record 295.

The Clerk will please print or cause to be printed, the foregoing parts of the record, together with these assignments and this statement of parts of the record which we think necessary to present the [fol. 319] points relied upon.

Claude Nowlin, S. A. Horton, Chas. Swindall, O. C. Wybrant,
Counsel for the Petitioners.

[fol. 320] [File endorsement omitted.]

IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 16, 1925

The petition herein for a writ of certiorari to the Supreme Court of the State of Oklahoma is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8432)

NO. [redacted] 158

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

SEWARD K. LOWE AND SUSAN LOWE, *Petitioners,*

vs.

ALEXANDER J. DICKSON, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI DIRECTED TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR THE WRIT AND BRIEF IN SUPPORT THEREOF.

CLAUDE NOWLIN,
S. A. HORTON,
Oklahoma City,

O. C. WYBRANT,
CHAS. SWENDALL.
Woodward, Okla.

Counsel for the Petitioners.

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NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

SEWARD K. LOWE AND SUSAN LOWE, *Petitioners,*

vs.

ALEXANDER J. DICKSON, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Seward K. Lowe and Susan Lowe, respectfully present to this court this petition for a writ of cer-

tiorari addressed to the Supreme Court of the State of Oklahoma, commanding said court and the clerk thereof to certify to this Court the record and proceedings of the case in said Court wherein your petitioners were plaintiffs in error, and the respondent, Alexander J. Dickson, was the defendant in error, together with its opinion therein for the review and determination of said cause by this Court.

The reasons relied on for the issuance of said writ and upon which your petitioners believe that a writ ought to be issued, and which will be more fully stated hereafter may be summarized as follows:

FIRST: That on the 3rd day of March, 1902, the respondent, Alexander J. Dickson, tendered to the land office at Woodward, Oklahoma, an application to file a homestead entry on the real estate involved in this transaction, and the same was received by the land office, a certificate of entry was allowed and the entry perfected so far as the records of the office were concerned. That said filing was under the homestead statutes of the United States, and will be governed in this case by Sections 2289, 2290 and 2291, R. S., as amended by the Act of March 3, 1891, Chapter 561, Section 5, 26 Stat. L. 1097. That on March 6, three days later, the department notified the respondent that his entry had been erroneously allowed for the reason that on the 22nd day of May, 1894, the

respondent had filed his homestead entry No. 509 on 160 acres of land; and on December 28, 1899, he made final proof under the Act of March 3, 1893, 27 Stat. L. 612, the land having been patented to him on April 21, 1900. Having thus exhausted his homestead right, the department held that his entry on March 3, 1902, was erroneously allowed, and they notified him as follows:

"Date of Entry	Remarks
Mar. 3, 1902	Erroneously allowed in that he made a five-year proof on a former entry H. E. No. 509, filed May 22, 1894, F. C., issued Dec. 28, 1899.
Mar. 6, 1902	Notified by Reg. mail, that the Hon. Comr. will doubtless hold that the entry H. E. No. 11185 for cancellation and that he has a right to relinquish and make application for the return of his fees and commissions.
Mar. 13, 1902	Return receive shows notice received Mar. 11, 1902."

No attention was paid to this notice by the respondent, and on May 22, 1902, 32 Stat. L. 203, Congress of the United States passed an act permitting entrymen who had filed on 160 acres, to file upon an additional 160 acres. The entry being still intact on the date of May 22, 1902, the department notified the respondent that this act removed his disqualification, and so notified Dickson. And on January 28, 1905, the peti-

tioner, S. K. Lowe, also designated as Seward K. Lowe, filed a contest upon the sole and only ground that Dickson had not cultivated the land and had abandoned the same. This contest was terminated in favor of the petitioners after being bitterly contested by the respondent. Said contest was ended on August 5, 1910, at which time the peittioner filed his homestead entry, and thereafter, on July 19, 1917, a final certificate was issued to him; and on the 13th day of April, 1918, the patent was issued to him. This is a suit to declare a resulting trust and to establish the ownership of this property in the respondent.

On July 2, 1906, the respondent tendered to the proper land office a second application to file on the land in question, which was rejected by the Land Department for the reason that the respondent already had an uncanceled entry upon the records which was then being contested. The theory of the respondent being that because his application of May 3, 1902, contained the following:

"That the local land office being more than 50 miles away I am unable to appear there at this time and that I have not heretofore made any entry under the homestead laws, except I filed W 1-2 NW 1-2 & W1-2 SW 1-4, Sec. 15, being 3 miles from west and eight miles from the north line of Woodward

County, and paid out on it about three years ago.

(Sign plainly with full Christian name.)

"ALEXANDER J. DICKSON.

"Sworn to and subscribed before me this 27th day of February, 1902, at my office at Beaver in Beaver County, O. T.

"CHARLES O. TANNEHILL, *Probate Judge.*"

that said entry was absolutely void and therefore the land was subject to his entry and that the department erred as a matter of law in not accepting and filing his entry of July 2, 1906.

The specific holding of the department is as follows:

"That his second entry of March 3, 1902, became good on passage of the Act of May 22, 1902, is clear upon the decisions cited by your office. Having a record entry which he was asserting, the act granting a second right, in the absence of any adverse right, cured all the infirmity of the entry at its initiation."

The District Court of Beaver County, Oklahoma, sustained the position of the respondent, holding that the application showed that he was disqualified and therefore the department committed an error of law in not filing his application of July 2, 1906; and the trial court further held that while his right to file on another 160 acres was granted him by the Act

of May 22, 1902, the department committed an error of law in holding that that validated his entry of March 3, 1902.

The Supreme Court of Oklahoma affirmed that judgment sustaining the contentions made by the respondent. The Supreme Court of the State of Oklahoma recognized the holdings of the Land Department as having been the rule announced by that department for a great many years; but the Supreme Court of Oklahoma held that the rulings of the Land Department holding were that where disqualifications were removed before any adverse right, that that validated the entry; but the Supreme Court of Oklahoma holds that is was bound by the decisions of this Court and held that the land office decisions was in conflict with *Prosser* v. *Finn*, 208 U. S. 67, and that the Oklahoma Supreme Court was bound to follow that case. It will be seen, therefore, that the primary point for this court to determine is the interpretation of its own opinion.

It is the contention of your petitioners that this Court did not intend to overrule and did not overrule the Land Departmen, but that Prosser vs. Finn. was merely construing Section 452 of the Revised Statutes of the United States, and that the decision has no reference to section 2289, 2290 and 2291, being the homestead Statutes of the United States; and therefore, that the department was correct in its holding. If

such should be the holding of this Court, that disposes of the case in favor of your petitioners. See also *Waskey* v. *Hammer*, 223 U. S. 85, construing the same section and assigning the reasons for the construction of that statute.

IMPORTANCE

It will be observed that the Land Department of the Government has continued to hold in line with the holding in the case at bar and has never recognized the case of Prosser vs. Finn as laying down any different rule. Therefore, if Prosser vs. Finn is inconsistent with the land office decisions, the Land Department has been continuously making the same mistake.

On March 14, 1917, in the case of *Dillard* v. *Hurd*, 46 L. D. 41, the rule was followed and has been followed any number of times since January 13, 1908, being the date of the opinion in the case of Prosser vs. Finn.

SECOND: The department declined to file the respondent's application of July 2, 1906, for the reason that he had an uncanceled entry of record at that time, there being in force at that date a departmental rule promulgated on June 14, 1899, as follows (28 L. D. 516 to 519):

> "In order that this important matter of regulation may be perfectly clear, it is directed that no application will be received, or any rights recognized, as initiated by the tender of an application for a tract embraced in an entry of record, until said entry has been canceled upon the records of the local office. Thereafter, and until the period accorded a successful contestant has expired, or he has waived his preferred right, applications may be received, entered, and held subject to the rights of the contestant, the same to be disposed of in the order of filing upon the expiration of the period accorded the successful contest-

ant or upon the filing of his waiver of his preferred right."

If this, therefore, was a valid departmental rule, then the department did not commit an error of law in refusing his second application of July 2, 1906, for at that time, his original entry was uncanceled; and the respondent therefore fails. This court, therefore, is called upon to determine whether or not that is a valid regulation of the Department of the Interior. If so, then the claim was rightfully rejected and no error of law was committed in rejecting the same.

The departmental construction of that rule is as follows: (34 L. D. 12):

> "Pending the disposition of a school land indemnity selection, even though erroneously received, no other application including any portion of the land embraced in such selection should be accepted, nor will any rights be considered if initiated by the tender of any such application."

It is the contention of your petitioners that the Supreme Court of Oklahoma is in direct conflict with the departmental decisions and the court so admits under the first proposition, but justifies it on the ground that they are following Prosser vs. Finn. Your petitioners' contention is that this is a valid rule and regulation and that it is so construed by this Court in the case of *Holt* v. *Murphy*, 207 U. S. 408, 52 L. ed. 271, where the rule that we have under consideration was carefully

discussed; and we believe that the court held in that case that it was a proper regulation and that the department was justified in rejecting this application under the holding in that case.

THIRD: The only act which is the basis for this petition to declare your petitioners as trustees for the benefit of the respondent grows out of the tender that Alexander J. Dickson made on July 2, 1906, the same being rejected. He was then on the land and remained there without any entry except the original entry made on March 3, 1902. He never made any final proof or tendered any to the department. He never did or performed any act toward obtaining a patent so far as the department is concerned, except tendering this rejected application. No rights can be acquired by merely tendering the application which is rejected; and the Supreme Court of the State of Oklahoma erred in holding that it was not necessary for him to have a filing upon the land and in holding that merely because he had, according to the Supreme Court of Oklahoma's view of the law, a right to have his entry received, that that alone was sufficient to enable him to bring this suit and to declare the petitioners as holders for him under the patent as issued by the Government. Such decision of the Supreme Court of Oklahoma is in conflict with Sections 2289, 2290 and 2291 of the Revised Statutes of the United States, and the Act of March 3, 1877, Chapter 122, 19 Stat. L. 403,

and also the Act of March 3, 1879, Chapter 192, 20 Stat. L. 472. These sections of the statute show clearly that in order to be entitled to a patent, that the respondent must have performed the conditions therein set forth; and no right could be initiated by tendering an application which was rejected.

Fisher v. *Rule*, 248 U. S. 314.
Northern Pacific Ry. Co. v. *Colburn*, 164 U. S. 383, 386.

FOURTH: The petition in this case pleads that the respondent had resided upon this land for more than five years subsequent to July 2, 1906; and he sought to make that proof in the State Court in the trial of the case, but did not otherwise attempt to comply with Section 2291 of the Revised Statutes of the United States. In the State Court he filed an affidavit as provided for by the Act of March 3, 1877, Chapter 122, 19 Stat. L. 403. He made no attempt whatsoever in the State Court or otherwise to comply with Section 1 of the Act of March 3, 1879, Chapter 192, 20 Stat. L. 472, which provides that notice shall be given as to making proof and the names of the witnesses, all of which must be filed with the register of the proper land office. None of these provisions of the Act of Congress were complied with in any manner except that he did attempt to prove that he had cultivated the land, which evidence was offered in the State Court.

Your petitioners insist that in order to maintain this suit,

that the respondent must show that he had performed all the things necessary to be performed on his part, and that the department erred as a matter of law in not issuing him the patents, and we insist that the mere tendering of an application under the homestead sections, which we have set forth, does not entitle him to maintain a bill in equity to declare your petitioners trustees for his benefit.

FIFTH: Your petitioners insist that whenever the Department of the Interior, through its proper officers, has jurisdiction to dispose of the particular land in question, and when the officers in the exercise of their jurisdiction receive an application in accordance with Sections 2289, 2290 and 2291 of the Revised Statutes of the United States, and issues a certificate of entry, that that entry is not void regardless of what it may show;—that it is merely voidable and segregates the land from the public domain of the United States, and it was therefore subject to contest by your petitioners.

United States v. *Hodgman*, 221 Fed. 1019.

SIXTH: The holding of the Supreme Court of the state of Oklahoma is equivalent to saying that it is unnecessary to file anything with the Land Department of the Government. All the homestead entryman has to do in accordance with the opinion of the Supreme Court of the State of Oklahoma is to tender an application to the proper land office; and if it is refused

then in that event the applicant merely files his petition in the state court and substitutes the court for the Land Department. This is an erroneous construction of these statutes and is inconsistent with the principles of equity which govern this class of proceeding.

FACTS

The Supreme Court of the State of Oklahoma held that the facts were pleaded by the respondent in his second supplemental petition and they merely held that it was proper to overrule a demurrer to that petition;—however, the evidence was introduced at the trial of the case and the facts are undisputed; and there is no question of weighing the facts or the evidence, which this court would not do in any case.

First.

That on the 22nd day of May, 1894, Alexander J. Dickson, the respondent herein, filed his homestead entry No. 509 on 160 acres of land in Woodward Cunty, in the State of Oklahoma; and on December 28, 1899, he made final proof and received F. C. No. 509 upon his paying the purchase price of One Dollar (1.00) per acre, as provided for by the act of March 3, 1893, 27 Stat. L. 612, the land having patented to him on April 21, 1900.

Second.

That thereafter, on March 3, 1902, he filed with the land office at Woodward, Oklahoma, the county where the land

was located, a homestead affidavit covering the land in controversy in this suit, which said homestead affidavit was regular and in conformity with the rules and regulations of the Land Department, and concluded with the following paragraph:

"That the local land office being more than 50 miles away I am unable to appear there at this time and that I have not heretofore made any entry under the homestead laws, except I filed W 1-2 NW 1-4 & W 1-2 SW 1-4, Sec. 15, being 3 miles from west and eight miles from the north line of Woodward County, and paid out on it about three years ago.

(Sign plainly with full Christian name.)

"ALEXANDER J. DICKSON.

"Sworn to and subscribed before me this 27th day of February, 1902, at my office at Beaver in Beaver County, O. T.

"CHARLES O. TANNEHILL, *Probate Judge.*"

said entry was allowed and a certificate of entry issued. This is referred to as entry No. 11185.

That on March 6, 1902, the department at Woodward wrote Dickson the following letter concerning said entry:

"Date of Entry.	Remarks.
Mar. 3, 1902	Erroneously allowed in that he made a five-year proof on a former entry H. E. No. 509

filed May 22, 1894, F. C., issued Dec. 28, 1899.

Mar. 6, 1902 Notified by Reg. mail that the Hon. Comr. will doubtless hold that the entry H. E. No. 11185 for cancellation and that he has a right to relinquish and make application for the return of his fees and commissions.

Mar. 13, 1902 Return receipt shows notice received Mar. 11, 1902."

Dickson paid no attention to the notification above set forth, and on May 22, 1902, 32 Stat. 203, the Congress of the United States passed an act authorizing homestead entrymen who had already filed on and received patents to 160 acres, to file on an additional 160 acres. The department held that this act validated the entry of March 3, 1902, and so notified Dickson.

Dickson purported to occupy the land from March 3, 1902; and on January 28, 1905, S. K. Lowe (one of the petitioners and the husband of Susan Lowe, they being joined defendants by reason of their being husband and wife, and whatever interest they might have in the property would be a homestead interest under the law of Oklahoma), filed a contest affidavit upon the sole and only ground that Alexander J. Dickson had abandoned the property and had not cultivated the same. This was denied by Dickson. This contest was heard

before the local land office, decided adversely to Alexander J. Dickson, which he appealed to the Land Department at Washington, the Department of the Interior, from said ruling.

On July 8, 1907, Dickson's entry No. 11185 was held for cancellation under the Lowe contest. It having also been held that Dickson's entry was validated by the Act of May 22, 1902. Rehearings were awarded, and finally, on July 30, 1910, the entry of Alexander J. Dickson was canceled by the department upon the sole and only ground that he had not lived upon the property as provided for under the homestead law.

On August 5, 1910, S. K. Lowe made homestead entry No. 02118 upon the land in question in this law suit, resided upon it, made his final proof, and his final certificate was issued to him on the 19th day of July 1917; and thereafter, on the 13th day of April, 1918, a patent was duly issued.

On July 2, 1906, Dickson filed an application to make a second homestead entry for the land covered by said entry No. 11185, upon the theory that his original entry of March 3, 1902, was void and showed to be void upon its face by reason of the fact that it showed that he had already exhausted his homestead right. This application was rejected for the reason that it was in conflict with his homestead entry No. 11185, which was then being considered by reason of the con-

test proceedings against it. That said application was therefore never allowed, and he never received a certificate of entry under his application of July 2, 1906, and never paid or tendered the fees required.

That during all this time, and from July 2, 1906, Alexander J. Dickson occupied this land, or a portion of it, having refused to surrender possession, and he occupied it until about the — day of July, 1918, when he was ousted by the order of the rourt.

That on the 19th day of July, 1917, he filed his petition in the District Court of Woodward County, in the State of Oklahoma, seeking to declare S. K. Lowe and Susan Lowe the holders of the legal title as trustees for his benefit, which said second and supplemental petition sets up all the facts herein stated to—or practically so.

Third.

The respondent, Alexander J. Dickson, did not offer any final proof of his occupancy and cultivation of the land to the Land Department of the Government, and did not tender any to the Land Department, but did in the state court plead and seek to prove by parol evidence what he was required to present and establish to the department of the Government as provided for in Section 2291 of the Revised Statutes of the United States, being the Act of June 21, 1866, Chapter 127,

14 Stat. L. 67, as amended by the Act of March 3, 1877, Chapter 122.

The respondent plead in his petition in the state court that he had resided upon the land and cultivated the same for a period of five years, and sought to prove the same by parol evidence, which was permitted by the state court; and he filed in the state court an affidavit which was required to be filed under Section 2291 of the Revised Statutes of the United States, but did not tender said affidavit to the department or file it with the department. See Act of March 3, 1877, Chapter 122, 19 Stat. L. 403.

The respondent did not publish any notice of intention to make a final proof with the names of his witnesses or in any manner or form seek to comply with Section 1 of the Act of March 3, 1879, Chapter 192, 20 Stat. L. 472.

The trial court, that is, the District Court of Beaver County, State of Oklahoma, held with the respondent, Alexander J. Dickson, holding that the entry of March 3, 1902, was void upon its face and did not segregate the land from the public domain of the United States and that the Department of the Interior should have received the application tendered on July 2, 1906, and that the respondent, Alexander J. Dickson, was entitled to this land.

This matter was appealed to the Supreme Court of the

State of Oklahoma, and the judgment of the trial court was by the Supreme Court of Oklahoma affirmed. A petition for rehearing was filed in the Supreme Court of the State of Oklahoma in conformity with the rules and regulations of that court, and the same was denied; and thereafter an application was made to stay the mandate and proceedings in the Supreme Court of the State of Oklahoma pending an application to file a second petition for rehearing. The said application was by the Supreme Court of the State of Oklahoma duly considered and was thereafter denied.

The original petition for rehearing was denied on the 7th day of May, 1925. The application to file a second petition for rehearing was denied by the Supreme Court of Oklahoma on the 12th day of May, 1925; and therefore, the judgment of the Supreme Court of the State of Oklahoma becomes final and conclusive, and authorizes this Court to entertain this petition for a writ of certiorari.

Your petitioners, in the brief accompanying this petition, will more particularly elaborate from the foregoing questions.

Your petitioners present herewith a certified copy of the entire record in said cause, including the proceedings of the Supreme Court of the State of Oklahoma and the opinion of said court.

Wherefore, your petitioners respectfully pray that a writ

of certiorari be issued under the seal of this Court, directed to the Supreme Court of the State of Oklahoma, sitting at Oklahoma City, Oklahoma, commanding said court to certify and send to this Court on day to be designated, a full and complete transcript of the record and all proceedings of said Supreme Court of the State of Oklahoma had in said cause. To the end that the said cause may be reviewed and determined by this Honorable Court, as provided by law, and that said judgment of the Supreme Court of the State of Oklahoma be reversed by this Honorable Court, and such further relief as may be proper.

CLAUDE NOWLIN,
Oklahoma City, Okla,
O. C. WYBRANT,
Woodward, Okla.
CHARLES SWINDALL,
Woodward, Okla.
S. A. HORTON,
Oklahoma City, Okla.

State of Oklahoma, Oklahoma County, ss:

S. A. Horton, being first duly sworn, on oath deposes and says that he is the counsel for petitioners, Seward K. Lowe and Susan Lowe; that he has read the foregoing annexed petition and knows well the contents thereof; that he has also carefully read and studied a duly certified copy of the transcript of the record which accompanies the petition herein, being the transcript of record in the case at bar, and that the

matters in said petition are, in the judgment of this affiant, duly supported in and by said transcript of record, and that he knows of the above proceedings had, and that the acts in said petition herein stated are true, to his best knowledge and belief.

S. A. HORTON.

Subscribed and sworn to before me this 25th day of June, 1925.

VERA BREWER,

Notary Public in and for the State of Oklahoma, Residing at Oklahoma City, Oklahoma.

My commission expires on the 28th day of August, 1928.

I do hereby certify that I have carefully examined the foregoing petition for a writ of certiorari, and the allegations thereof are true, as I verily believe, and in my opinion the petition is well founded and the case is one in which the prayer of the petition should be granted by this Court.

S. A. HORTON,

Counsel for the Petitioners.

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

STATEMENT OF FACTS

The facts are already sufficiently stated for the purpose of this brief, which will be short, intended only to show the Court that we are entitled to have the writ of certiorari granted and thus be able to present the case fully.

The Supreme Court of Oklahoma held that the amended and supplemental petition filed by the respondent stated the facts and held that the petition stated a cause of action. The petition, however, is very long, and we believe the matter would be very much simplified by just copying the opinion of the Supreme Court of Oklahoma as a part of this brief. The opinion has not been published at the time this was written, but the following is an exact copy thereof; and it shows, as we believe, the essential facts to enable this Court to see what this case is really about, and enable this Court to determine whether or not we are entitled to have this writ of certiorari allowed by this Court.

Under the rules and regulations and practice before the Supreme Court of Oklahoma, the record is not printed, and therefore, under the rules of this Court, it will be necessary to print the record, but there is no record printed; so we cannot

refer to the page of the record where this opinion will be found. Leaving off the formal parts, the opinion is as follows:

"SYLLABUS.

"1. Where an application for homestead entry upon lands of the United States is made by one who, under existing laws of the United States, is disqualified from making such application, the same is void.

"2. An application for homestead entry upon the lands of the United States which is void when made, is not rendered valid by a subsequent law removing the disqualification of the applicant.

"3. Where the application for homestead entry and the records of the land office disclose upon their face that such application is void, the land covered thereby is not segregated nor withdrawn from settlement by reason of such void application.

"4. The fact that one has entered upon and is holding lands of the United States under homestead application which is void upon its face does not authorize a contest upon the ground of failure to cultivate, and one instituting such contest obtains no preferential right thereby.

"5. The principle is well settled that where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner and compel him to convey the legal title. *Prosser* v. *Finn*. 208 U. S. 67.

"Error from District Court of Beaver County.

"Hon. Arthur G. Sutton, Judge.

"O. C. Wybrant, C. W. Herod, S. A. Horton, for Plaintiffs in Error.

"Homer Boardman, Dickson & Dickson, for Defendant in Error.

"Affirmed.

"Gordon, J.:

"This action was begun in the District Court of Beaver County, by defendant in error, against plaintiffs in error, for the purpose of recovering certain lands in that county, together with the usable value thereof, from and after the 17th day of July, 1917. The parties will be designated as in the trial court.

"Plaintiff claims in his petition to be the equitable owner of the said land by reason of the following state of facts:

"That on the 2nd day of July, 1906, said tract of land was public land of the United States, subject to homestead entry, unappropriated and without any legal entry thereon; that plaintiff being duly qualified, did make and present to the Register and Receiver of the United States Land Office at Woodward, Oklahoma, his homestead application therefor under the laws of the United States, and did all the things necessary to constitute a proper application, but that said register, instead of allowing said application, did wrongfully reject the same for the sole reason that said land was covered by the homestead entry of plaintiff made by plaintiff on March 3, 1902, being homestead entry No. 11185. But plaintiff says that said former entry, No. 11185, was void and its invalidity appeared upon the face of the entry paper and upon the face of the record kept by said register and receiver. In explanation of this void entry, plaintiff charges that on

May 22, 1894, he made homestead entry No. 509, at said land office, for certain other lands in Woodward County, and on May 28, 1899, he made five-year final proof under said entry and received final certificate No. 509, and that patent was issued therefor on April 21, 1900. Plaintiff says that by reason of this fact, he was disqualified on March 3, 1902, to make homestead entry on the tract involved here. It is alleged that on February 27, 1902, plaintiff executed homestead application to enter the land involved here, before the probate judge of Beaver County, and caused same to be forwarded to the land office at Woodward; that said application was received at Woodward, on March 3, 1902; that in said application he set forth the fact that he had theretofore made homestead entry No. 509, and had made final proof thereon and had received patent on April 21, 1900; that when the register received application No. 11185, he endorsed on the proper contest docket a notation, showing the fact as to entry No. 509, and reciting notice to plaintiff, and on March 13, 1902, entry was made on the same docket showing receipt of notice. Plaintiff states that in attempting to make entry No. 11185 he acted in good faith, believing at the time that his right to make the second homestead entry had been restored by law. It is further pleaded that plaintiff, on March 13, 1902, received notice from the register showing that entry No. 11185 was erroneous by reason of the former entry and that application for return of fees might be made. Plaintiff took no action under this notice. When he made his application on July 2, 1906, same was rejected on the ground that it was in conflict with homestead entry No. 11185. Plaintiff says that he was, on July 2, 1906, qualified to make homestead entry for said land, because on May 22, 1902, Congress passed an act by virtue of which plaintiff's disqualifications were removed. It is alleged that from the action of the register and receiver of the said office in

rejecting this application appeals were taken, finally reaching the Secretary of the Interior, who affirmed the original decision; and thereafter, a rehearing was had upon an original affidavit of contest, upon which hearing the register recommended the cancellation of said entry upon the ground of abandonment. The petition then sets out at length the various appeals from this ruling and its affirmance, and further alleges that on January 28, 1905, the defendant, Seward K. Lowe, filed in the land office at Woodward, a pretended affidavit of contest against the plaintiff, charging abandonment of entry No. 11185, and failure to cultivate and improve as required by law. That said contest was unlawfully entertained and recommendation made by the register that said entry be cancelled. This decision was finally affirmed by the Secretary of the Interior. It is alleged in substance that all the contest proceedings were of no affect for the reason that they were aimed at the entry of March 3, 1902, which was void, and the invalidity was apparent of record. It is therefore alleged that all the actions of the Land Department in entertaining such a contest and in refusing to allow plaintiff's entry of July 2, 1906, were error as to a pure and unmixed question of law. That in view of the fact that plaintiff was legally entitled to enter said tract, under his application of July 2, 1906, and was the first legal applicant to make entry thereon, and said Lowe was not entitled to contest the illegal entry of March 3, 1902, which had been immediately suspended and rejected, and said Lowe was, under said illegal contest, awarded the preference right to enter said land, he was not entitled to make said contest or entry. Plaintiff alleges that defendant Lowe did, on August 6, 1910, make homestead entry to the lands involved here, and on July 19, 1917, did receive final certificate thereto, and thereafter, on April 13, 1918, patent issued to him. For the reasons stated, plaintiff claims that defendant, Seward

K. Lowe, is holding title as trustee for him and prays a decree so adjudging and further a decree directing conveyance of said land by defendant to him. There is also prayer for recovery of the usable value of the land from the time plaintiff was deprived of possession thereof.

"Defendants in their answer admit that patent to the land in controversy was issued and delivered to Lowe on April 13, 1918. They further say that on February 27, 1902, this land was owned by the United States and was vacant and unappropriated and open to entry; that on said date, plaintiff made application to enter upon same and on March 3, 1902, application was allowed by the Department of the Interior; that the question of plaintiff's qualification to enter was presented in connection with the application and it was held that plaintiff was qualified to enter and that such entry remained intact upon the record until cancellation thereof by the Interior Department on the [illegible]th day of August, 1910. Defendants say that this question having been adjudicated by the Interior Department, this court is without jurisdiction to determine such question in this action. Defendant pleaded estoppel against the assertion of the invalidity of this entry because of the application and its allowance by the department. They say that while this entry was in force, defendant Lowe, on January 28, 1905, filed in the land office at Woodward, an affidavit of contest against said entry upon the ground of abandonment and failure to improve and cultivate. That plaintiff joined issue upon these allegations and asserted that he was fully complying with the law. That said entry was cancelled by the Interior Department upon the ground that plaintiff had failed to comply with the law and that defendant was awarded the preference right to enter, and on August 6, 1910, defendant made entry No. 021188 for said land and complied with the law so that patent was issued to him. Defendant says that it was not until July, 1906, that

plaintiff asserted the invalidity of his entry No. 11185, when it became apparent that the department would cancel said entry. In his reply, plaintiff denies generally the allegations of the answer.

"The case was tried to the court; there was judgment for plaintiff declaring the defendant to be holding the land as trustee for plaintiff and rendering judgment for the usable value of the land for several years during which it had been held by defendant Lowe. Due exceptions were saved, and upon the overruling of a motion for new trial, the cause was appealed to this Court.

"While there are eight assignments of error, we are of the opinion that these various assignments present in different ways the few questions involved here. The questions to be decided are:

"1st. Whether plaintiff's alleged entry No. 11185 was void with its invalidity appearing upon the face of the record.

"2nd. If this entry No. 11185 was void at the time it was made, was it rendered valid by the continued holdings of the plaintiff thereunder after the passage of the Act of May 22, 1902, which rendered plaintiff qualified to made the entry.

"3rd. Did the successful prosecution of the contest by the defendant create in his favor a preferential right of entry upon the land, admitting that plaintiff's entry was originally void upon its face.

"Other questions are argued, to-wit, claim of estoppel against the plaintiff; the assertion by the defendant of laches and that the judgment for the usable value was not warranted by the evidence, but these latter questions are not, as we view it, of serious importance here, though they will, of course, be passed upon.

"In considering these questions, we find that when plaintiff attempted to make this entry No. 11185, he had already exhausted his rights under existing laws, and was precluded from making this entry by such existing law and the fact of his former entry and the fact that the same had been paid out and that the manner and time of such payment were of record in the land office. Under the rules governing such entry the applicant was required to file with his application an affidavit showing his qualification to make the entry. This he did, setting out the full description of his former entry. The Land Department takes judicial notice of its records. *Lightner* v. *Hodges*, 3 L. D. 192; *Ward's Heirs* v. *Laborraque*, 22 L. D. 229. The local land office took the view that the entry was void and so advised the applicant. No other conclusion could have been reached. The attempted entry was void, not by reason of any concealed disability on the part of the applicant, but by reason of the facts as they appear of record. It must follow that the land involved was not thereby withdrawn from further appropriation. See case of *Davis Phitz*, 2 L. D. 191; *Wilcox* v. *Jackson*, 13 Peters 498. The defendant Lowe was at liberty after this attempted entry to apply for entry upon the land. It is evident that if the entry of Dickson was void and if he obtained no rights thereby, there was no room for a contest on the ground of abandonment. Yet, out of such a contest arises the right of defendants here, if any they have. The department, in finally passing upon the contest, realized this difficulty. In the opinion finding in favor of contestant on appeal, the department says:

" 'You held the fact and regularity of the illegal appeal of July 10, 1906, and the original invalidity of the second entry (made March 3, 1902) were material questions, because Dicksons continued assertion of right under his second entry (which has reference to his entry of March

3, 1902) after the passage of the Act of May 22, above, cured the entry and made it valid, citing *Smith* v. *Taylor,* (23 L. D. 440); George W. Blackwell (11 L. D. 384); John J. Stewart (9 L. D. 443).'

"And further:

" 'That his second entry of March 3, 1902, became good on the passage of the Act of May 22, 1902, is clear upon the decisions cited by your office. Having a record entry which he was asserting, the act granting a second right, in the absence of any adverse right, cured all the infirmity of the entry at its initiation.'

"This brings us to the question submitted by the above quotation, which is, whether the original entry was validated by a subsequent act which would render the plaintiff qualified to make the entry. The holding of the department that the original void entry was so validated is supported by a number of decisions of the Land Department and some of them are cited in the matters above quoted. These opinions are entitled to great weight and should not be overruled except for cogent reasons and unless it be clear that such construction is erroneous. *United States* v. *Johnson,* 128 U. S. 31 L. Ed. 389. But a different conclusion has been reached by the Supreme Court of the United States in the case of *Prosser* v. *Finn,* 208 U. S. 67, 52 L. Ed. 392, and the law as laid down in that case is binding upon us here. In that case, Prosser, who was a special agent of the general land office, had made a timber-culture entry for the land involved, and under this entry had gone upon the land, planted trees and improved the land at great labor and expense. At the time of making his entry, the law in force prohibited employes of the Land Department from making such entry upon the public domain. Prosser had been advised by officials of the Land Department that he, as special agent, did not come within the inhibition contained in the laws.

More than five years after such entry, an affidavit of contest was filed embracing the charge that Prosser's entry was in violation of law. The relief sought was the cancellation of the entry and its forfeiture to the United States. This contest was finally sustained by the Interior Deparment and patent was issued to a third party who made entry. Prosser began his action to have the holder of the patent declared to hold the land as trustee for his benefit. Prosser claimed in his petition that while his original entry was void, by reason of the fact that he was an employe of the department, yet he had made the entry upon the special advice of the commissioner of the land office, advising that he was not regarded as coming within the terms of the word 'employe,' that he had at great expense cultivated the land and planted trees thereon, and that while he was in possession of the land and long prior to the institution of any contest he had ceased to be a special agent of the general land office or to have any connection with the Land Department. His claim was, that having continued to occupy the land and to cultivate the same after he was in possession and authorized under the law to make a valid entry and this state of affairs being in existence before any contest was begun, his former entry became by these facts validated. Patent had been issued to Finn by the Department after the decision of the contest and the cancellation of Prosser's entry. In the opinion in this cause, it is said by the court on page 395 of the citation from the law edition:

" 'The principle is well settled that where "One party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner and compel him to convey the legal title." *Stark* v. *Stark*, 6 Wall. 402, 419; 18 L. Ed. 925; 930. *Silver v. Ladd*, 7 Wall. 219, 19 L. Ed. 138; *Cornelius v. Wessel*, 128 U. S. 461, 32 L. Ed. 484, 9 Sup. Ct. 122; *Bernier v. Bernier*, 147 U. S. 242,

37 L. Ed. 152, 13 Sup. Ct. Rep. 244; Re. Emblem, 161 U. S. 52, 40 L. Ed. 613, 16 Sup. Ct. Rep. 487.'

"And further on page 396:

" 'The law as we now recognize it to be, was the law when the plaintiff entered the lands in question, and, being at the time an employee in the land Office, he could not acquire an interest in the lands that would prevent the government by its proper officer or department, from canceling his entry and treating the lands as public lands which could be patented to others. It may be well to add that the plaintiff's continuing possession after he ceased to be special agent was not equivalent to a new entry. His rights must be determined by the validity of the original entry at the time it was made.'

"We think a careful analysis of that case disclosed that it disposes of practically all the questions in the case before us here. In the case we are now considering the contest was based upon abandonment and failure to cultivate. In order to justify such a contest, it was necessary that it be predicated upon a valid entry or at least upon an entry so far valid as to effect a withdrawal of the land from public appropriation. To do this, the Department held in consonance with its former holding that a continuance of the occupancy under the original entry after the disability had beeen removed, validated the original entry. Such holding is expressly disapproved and the contrary is held in the Prosser case supra. This question was fully argued in that case, as appears from the brief on plaintiff in error, citing the various decisions of the Land Department upon that point. This is a pure and unmixed question of law and the right of plaintiff in error to maintain his action in the manner and for the purpose of declaring the trust, is affirmed in the Prosser case. In the case before us, the matter of the hardship upon the defendants who have spent their money

upon the contest proceeding, and after long litigation bitterly contested by plaintiff, have been issued a patent and have occupied the land for a number of years, is urged. And it is further urged that by attempting to refute the allegations of the contestant and by insisting upon his right to hold the land under his original entry, plaintiff is estopped to deny the validity of his original entry, and is estopped to claim under his application of July 2nd, 1906.

"As to both of these matters it may be well to quote the expression of Mr. Justice Harlan in the Prosser case supra, as found on page 394 of the citation from the Law Edition:

" 'A great hardship has been done the contestee in this case, because we have no doubt he was led to make this entry upon the authority of the letter before referred to; but, holding to the doctrine that special agents come within the inhibitions of par. 452 of the Revised Statutes, we are unable to afford him the relief we would desire to give. We therefore hold that said timber-culture entry was void in its inception and recommend its cancellation.'

"We know of no way by which plaintiff may have estopped himself to set up the invalidity of his attempted entry of March 3, 1902, unless it be by some deceitful conduct or some misrepresentation that has misled the defendant to his disadvantage as to the facts. But it appears that early in the contest proceeding, plaintiff was asserting that his entry of March 1902, was void. This matter was decided against the plaintiff upon appeal and decided upon the erroneous theory that his original void entry had been subsequently validated. The facts surrounding this matter were well known to all the parties involved and were apparent of record, of which record, the defendant, Lowe, was bound to take notice. Again, it is urged, that plaintiff has been guilty of such laches

as should bar this action. We are unable to so find. Plaintiff occupied the land under his claim until the year 1917. This action was begun on July 19, 1917; defendant received his final certificate on July 19, 1917. We are therefore of opinion that the original entry of March 3, 1902, was void, and following the law, as announced in *Prosser v. Finn*, Supra, that this void entry was not therefore validated by the continued possession of the land thereunder after he had become qualified by law to make a valid entry, and that the holding of the Department that such void entry was thereafter validated was error. It follows that in July, 1906, the land was open for entry.

"We have examined the authorities upon this proposition, to which plaintiffs in error have called our attention in their brief. The cases of *Hodges vs. Colcord*, 193 U. S. 48 L. Ed. 677, is authority for the proposition that an entry prima facie valid, withdraws the land covered thereby from further entry so long as such entry remains uncanceled. And this is said in the opinion to be the holding of the Land Department. The distinction between entries void upon the face thereof, and those prima facie valid, is discussed, and it is upon this distinction that the judgment in the case appears to be based. In the case of *Hastings & Dakota R. Co. vs. Whitney*, 132 U. S. 33 L. Ed. 363, the contention was made that the entry was void on its face, but in this opinion it was held that such was not the fact. On page 366, Law Ed. it is said:

" 'We do not think this contention can be maintained Under the Homestead Law three things are needed to be done in order to constitute an entry on public lands; first, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and third, he must

make payment of the money required. When these three requisitives are complied with, and the certificate of entry is executed, and delivered to him, the entry is made—the land entered. If either one of these integral parts of an entry is defective, that is, if the affidavit be insufficient in its showing, or if the application itself is informal, or if the payment is not made in actual cash, the register and receiver are justified in rejecting the application. But if, notwithstanding these defects, the application is allowed by the land officers, and a certificate of entry is delivered to the applicant, and the entry is made of record, such entry may be afterwards conceled on account of these defects by the commissioner, or on appeal by the Secretary of the Interior; or, as is often the practice, the eentry may be suspended, a hearing ordered, and the party notified to show by supplemental proof a full compliance with the requirements of the Department; and on failure to do so the eentry may then be conceled. But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity.'

"The first requisite, as above prescribed, is that the applicant must make an affidavit, setting forth the facts which entitled him to make such entry. In the case before us, the affidavit and the record show the applicant not entitled to entry. It is not a case where there is merely a defect in the affidavit, either as to form or substance, but the affidavit and the record in themselves deny the right to entry and it was so considered by the Local Land Office. The case of *McMichael vs. Murphy*, 197 U. S. 49 L. ed. 766, involves an entry valid on its face and the opinion fails to draw a distinction between such entries and those void upon their face. The remaining cases cited by plaintiffs in error appear to involve the same question of an entry prima facie valid. In the case here, the Department has predicated the right of the contest upon the fact, not that the original entry against

which the constant was instituted was valid in its inception, or even prima facie valid, but upon the sole theory that it, while void in its inception, was subsequently validated by the Act of Congress removing the disqualification of the entryman, and this, as we have seen, according to the decision in the *Prosser* v. *Finn*, supra, was error. If we are right in our holding that the entry in the case before us was void upon its face, then the authorities cited by plaintiffs in error upon this question are not in point. The form of action here is the usual action adopted to test the rights of one claiming the equitable title as against a holder of the record legal title. Plaintiff made proper tender of his application to entry on July 2, 1906. It is not claimed that he failed in any of the essential elements of such application. The adjudication of the questions involved is not a substitution of the court for the Land Office, but involves the question of whether or not the Department erred in a pure matter of law. See *Hammer* v. *United States*, 204 Fed. 898; *James* v. *Germania Iron Co.*, 107 Fed. 597. We recognize that the facts, as found by the Department, are controlling upon this court. The evidence is practically contained in the pleadings, except upon the question of the usable value of the land. Upon this point, there seems to have been little controversy at the trial in the court below. The evidence upon this question is sufficient to sustain the judgment of the court. The judgment of the trial court is therefore, in all things, affirmed.

McNeil, C. J., Johnson, Brancon, Lydick and Warren, J. J., concur.

This opinion of the Supreme Court of the State of Oklahoma is clearly in conflict with the rules of the land office and the opinions of this court and also the Acts of Congress under

which this claim is based. We quote from the opinion of the State of Oklahoma, as follows:

> "We think a careful analysis of that case disclosed that it disposes of practically all the questions in the case before us here."

The above quotation is a quotation from the Supreme Court opinion in the case at bar, and refers to *Prosser vs. Finn,* 208 U. S. 67. It is very clear, then, that the real issue in this court is for this court to determine what it meant in the case of Prosser vs. Finn.

FIRST ASSIGNMENT OF ERROR.

The Department of the Interior in the case at bar held that though the respondent's entry on March 3, 1902 was erroneously allowed, yet the disability of the respondent having been removed on May 22, 1902, that validated his entry; and that on January 28, 1905, the respondent had an entry on file that was valid and was subject to Lowe's contest; and therefore, the land was not subject to entry on July 2, 1906; and therefore, the Department was right in refusing to file his application which was tendered on July 2, 1906.

ARGUMENT

It is clear from the opinion of the Supreme Court of Oklahoma that the foregoing proposition was the basis for the decision in the case at bar. It is equally clear that the Supreme

Court of Oklahoma recognized that the ruling of the Department of the Interior in this case was a long recognized rule of the Department and doubtless, the Supreme Court of Oklahoma would have followed the departmental rule, but for the reason that it was the view of the Oklahoma Supreme Court that this court had held otherwise in Prosser vs. Finn and therefore, they were bound by the decision of the Supreme Court of the United States on the question involved. Therefore, the first important question to determine here is whether or not the Supreme Court of Oklahoma erroneously construed the opinion of this court.

It is obvious that the Supreme Court of Oklahoma did misconstrue *Prosser vs. Finn*, 208 U. S. 67. It is so clear that they did, until it is impossible to argue. In other words, some things are so simple until it is impossible to argue them at all; and that is the way this appears to us.

The policy of the Land Department has always been to encourage homestead settlers upon the public lands of the United States; but public policy would prevent employees of the Land Department from taking advantage of confidential information they might obtain while with the Department; and therefore, on April 25, 1812, Congress of the United States passed Section 452 of the Revised Statutes, being the

Act of April 25, 1812, Chapter 68, 2 Stat. L. 717, which is as foflows:

> "The officers, clerks, and employes in the General Land-Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land, and any person who violates this section shall forthwith be removed from his office."

It would be rather a burdensome task to read all of the decisions of the Department under that Section so that we could make the positive statement that every single decision of the Department since the passage of this Act has held that no right could be acquired by an employee of the Land Department by reason of the prohibitive language of this statute and the evident policy of Congress as indicated by its enactment. *Prosser vs. Finn,* therefore, merely follows the Land Office decisions in that construction of that section of the Federal Statutes.

Mr. Justice Harlan in the case of *Prosser vs. Finn,* states:

> "This case depends upon the construction to be given to Section 452 of the Revised Statutes. If Prosser's original entry was forbidden by the above statute, then nothing stood in the way of that entry being canceled by order of the Secretary of the Interior in a proceeding that directly involved its validity."

The real question decided in Prosseer vs. Finn is whether or not Prosser was an employee under Section 452 of the Re-

vised Statutes. The court in that case, held that he was such employee and therefore was within the prohibitive terms of the statute. The case of Prosser vs. Finn and Section 452 of the Revised Statutes was carefully considered by this court in *Waskey vs. Hammer*, 223 U. S. 85, wherein the reasons for construing the statute as prohibitive and explaining somewhat the decision of Prosser vs. Finn, these decisions show clearly, show very clearly that they do not intend to hold that where an entryman under the homestead section was disqualified and his disqualifiications were removed prior to the initiation of any adverse right, that that would not validate the entry.

The Department has been holding that where the disabilities were removed before the initiation of an adverse right, that that validated the entry, beginning with *James F. Bright*, 6 L. D. 602, decided March 31, 1888 including the case at bar and the last case is *Dillard vs. Hurd*, 46 L. D. 41, decided March 14, 1917. The rule there announced is as follows:

> "A contest brought upon the ground that the entryman is a minor and not the head of a family must fail where, prior to the filing of contest affidavit, the entryman attains his majority.
>
> "Where one under 21 years of age and not the head of a family is permitted to make a homestead entry, but attains his majority before the filing of a contest affidavit charging failure to reside upon and cultivate

the land as required by law, such contest must fail if six months had not elapsed since the entryman became 21 years of age."

It will be noticed that Prosser vs. Finn was decided January 13, 1908. The Department of the Interior has never referred to that decision as having any application under the homestead provisions of the Statute.

On March 15, 1915, the matter was before the Federal Court in the case of *United States vs. Hodgman*, 221 Fed. 1018, where the same principle was followed, and the earlier cases from this court rited.

In a very recent case from the Supreme Court of Colorado entitled *Huff vs. Greis*, 203 Pac. 677, the Supreme Court of Colorado held under the homestead sections of the Statute that the disability being removed prior to the advent of any adverse right, validated the entry, citing 46 L. D. 41 and also *In Re James F. Bright*, 6 L. D. 602.

We are not unmindful that the mere fact that the land department has not changed its rulings or referreed to *Prosser vs. Finn* since it was handed down under any other section than 452, does not bind this court; and we are also aware that the mere fact that the Supreme Court of Colorado may have followed the rulings of the Land Department erroneously, does not require this court to follow these decisions; but it is

convincing to us that our understanding of what the Supreme Court of the United States held, is correct; and that is, that the decision of *Prosser vs. Finn* has no application except under Section 452.

We do, however, insist that even though this court may disagree with us, still we have the Land Department adhering to the original rule; the Supreme Court of Colorado; the Supreme Courts of several other states edhering to the original rule, by which we would conclude that these courts interpret *Prosser vs. Finn* as applying under Section 452. But if this writ of certiorari is denied, then we have a conflict between the departmental ruling and several states on one side, and the Supreme Court of the State of Oklahoma on the other side. This, therefore, is a very convincing reason for the granting of this writ of certiorari and determining whether or not this court really meant to hold that the removal of the disqualifications did not validate the entry under the homestead sections of the statute.

SECOND ASSIGNMENT OF ERROR.

The Supreme Court of Oklahoma held that the Department of the Interior erred as a matter of law in rejecting the application of the respondent tendered on July 2, 1906 for the reason that the entry that was already upon the land and un-

canceled was void and did not segregate the land from the public domain of the United States.

Argument.

It will be observed that it is the theory of the respondent and is the theory of the Supreme Court of Oklahoma that the application tendered on July 2, 1906, was in all things strictly in conformity with the law, and that the entry that was on file was void and therefore the department committed an error of law in not filing his application issuing him a certificate of entry. This is clearly in conflict with the rules of the Department as construed by the Supreme Court of the United States which were in force at the time these proceedings were had. In an early day, various land offices had different methods;—sometimes an application would be received and held to await a contest or for various reasons;—sometimes they would have a number of applications on file, all of which created a great deal of confusion.

The Act of Congress creating the department authorized the department to make certain rules and regulations which were regarded by the department as helpful in the administration of the law; and in order to eliminate these different conflicts and filings, and in order to prevent the confusion incident thereto, on June 14, 1899, the department promulgated the following rule:

> "In order that this important matter of regulation may be perfectly clear, it is directed that no application will be received, or any rights recognized, as initiated by the tender of an application for a tract embraced in an entry of record, until said entry has been canceled upon the records of the local office. Thereafter, and until the period accorded a successful contestant has expired, or he has waived his preferred right, applications may be received, entered, and held subject to the rights of the contestant, the same to be disposed of in the order of filing upon the expiration of the period accorded the successful contestant or upon the filing of his waiver of his preferred right."

The Land Department has construed this rule as follows in the case of *Santa Fe & Pacific Railway Co. vs. The State of California*, 34 L. D. 12:

> "Pending the disposition of a school land indemnity selection, even though erroneously received, no other application including any portion of the land embraced in such selection should be accepted, nor will any rights be considered if initiated by the tender of any such application."

It will be observed, therefore, that on July 2, 1906, regardless of any other feature, the Land Department would have denied his application under the rule which was then in force; so it makes no difference whether the entry was void, valid, or what might have been its status; so long as it was uncancelled, no further entry could be received, and if this is a correct proposition of law and these rules and regulations are valid rules and regulations, then the respondent has no

standing for the reason that the land was not subject to his entry on July 2, 1906. If the proposition advanced is a correct one: that is to say, that the petitioners did not acuire any right by this contest, then immediately upon the respondent's entry being canceled, by virtue of the adverse holding in the contest proceedings, the respondent could have made application to file upon the land; but he did not do that;—he elected to wait about six years and then file this suit.

This court has determined this point in our favor, as we understand it, in the case of *Holt vs. Murphy*, 207 U. S. 408, 52 L. ed. 271, wherein Mr. Justice Brewer, speaking for this court said:

> "A soldier's declaratory statement filed during the time allowed for an appeal to the Secretary of the Interior from a decision of the Commissioner of the General Land Office against the validity of a prior homestead entry confers no rights upon the applicant, where, by a rule of the Land Department in force when a patent for the land is finally issued, no application will be received or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record until said entry has been canceled from the records of the local office."

It seems to us that this decision very clearly and forcibly established the law in favor of your petitioners. That is to say, that the land department had authority to make the rule above set forth and had a right to enforce it; and if such be the law, then on July 2, 1906, there was an uncanceled entry

of record and therefore the Department of the Interior committed no error of law in refusing to file the application thus tendered;—and therefore, the respondent must fail regardless of any other legal points there is involved in this case, for he clearly states in his petition that the entry of March 3, 1902 being void did not segregate the land from the public domain of the United States and the Department of the Interior committed an error of law in not receiving his application of July 2, 1906 and that is the basis of this law suit.

In a very recent case, this court has had occasion to remark that the court would not overthrow the rules and regulations and the decisions of the Department where they were of long standing. The rule announced under the first assignment of error in this brief has been followed since 1888, and the rule under this assignment has been followed an almost equal length of time. Instructive recent cases on the points involved in this case are:

McLain vs. Fliecher, 256 U. S. 477.
Brown vs. United States, 113 U. S. 571.
Wells vs. Fisher, 47 L. D. 288.
Logan vs. Davis, 233 U. S. 613.
Fisher vs. Rule, 248 U. S. 314.

By way of illustration,—if the respondent's contention is true, then we may eliminate entirely the petitioners, and for a moment forget that they ever contested this entry;—that

the entry of March 3, 1902 was never made, for that is the legal effect of the contention of the respondent. On July 2, 1906, he being on the land, he tenders this application which was rejected by the Land Department. It would be interesting for him to explain how he would get title to this land under his theory. He could not file this kind of a suit, because there would be nobody to be declared a trustee;—it merely shows the unsoundness of his contention, for under his theory he had no filing on the land;—there was nobody he could bring a suit against;—he could make no final proof before the Department. We might explain what we think about it here. If his contention is true, he should have mandamused the department and required them to file his application; and that is his only remedy, because he can never acquire title to this property until he gets a valid entry.

Payne, Sec'y. vs. United States, 255 U. S. 438.

THIRD ASSIGNMENT OF ERROR.

The effect of the decisions of the Supreme Court of Oklahoma is to hold that the land was unappropriated public land on July 2, 1906, and all the claimant had to do was to file an application; and if it was rejected, then substitute the court for the land department and obtain his title.

Argument.

This feature of the case seems to us more out of line

with judicial reasoning and a proper administration of the public land laws than the other points that we have suggested. It will be observed from the statement of facts, and it will also be observed from the amended and supplemental petition, that the entire basis for the suit is the rejected entry of July 2, 1906.

The respondent alleges in his petition that he lived upon the land, improveed and cultivated the same for more than five years subsequent to July 2, 1906. He also filed in the trial of the case an affidavit and offered parol evidence in his effort to show that he had complied with Section 2291 of the Revised Statutes of the United States. He never alleged in his petition and never sought to prove that he had tendered final proof to the Department or that he had tendered the affidavit to the Department and that the same had been wrongfully rejected; but he sought to have the trial court substituted for the land department in receiving his proof; and then, in the State Court, sought to show that on July 2, 1906 he tendered an application in conformity with Section 2290 of the Revised Statutes of the United States, which was rejected by the Department. He never prepareed affidavits of his residence, occupancy and had the same transmitted or tendered to the Receiver of the Land Office as provided for under the act of March 3, 1877, 19 Stat. L. 403. He never published notice

that he expected to tender his final proof as provided for by the Act of March 3, 1879, 20 Stat. L. 472.

We believe that we can say, without any fear of being contradicted, that this is the most novel law suit that was ever filed;—no man has ever attempted to establish a resulting trust under such a state of facts as the one at bar.

Since Section 2289 was amended by the Act of March 3, 1891, Chapter 561, Section 5, 26 Stat. L. 1097, it has never been suggested that any right could be acquired under the homestead section of the Statutes by mere occupancy; and the evidence in the case at bar shows that his occupancy was wrongful. The state court was without authority to hear his final proof; for it was the province and duty of the Department of the Interior to determine whether or not he had occupied the land in question for the length of time required under the Statutes. It was the province and duty of the Department to receive his affidavits and we are confronted with a case where the respondent asks the court to assume the jurisdiction conferred by the Department of the Interior, hear his final proof without ever offering it to the Department:—asks the court to receive his affidavits without ever filing them with the Department or offering them to the Department and without ever having an entry on file in the Department. It is impossible to argue this point, for in order to constitute an argument, there must be something to argue about.

In other words, no right could be initiated by a tender which was rejected. See *Fisher vs. Rule,* 248 U. S. 314. *Criley vs. Burrows,* 17 Wall. 167. *Columbus C. Mabry,* 48 L. D. 280. It is well settled that no right, either homestead or otherwise can be acquired prior to the actual entry in the local land office and that the mere occupancy of public land grants no right. *Kansas Pacific Railroad Co. vs. Dunmyer,* 113 U. S. 629. *Northern Pacific Railway Co. vs. Leonard P. Colburn,* 164 U. S. 363. *United States vs. MidWest Oil Co.,* 236 U. S. 459. *Johnson vs. Drew,* 171 U. S. 94. *Fisher vs. Rule,* 248 U. S. 314. These cases hold that the mere fact that the respondent tendered an application to the Land Department which was rejected, can not be made the basis of any right.

In other words, on July 2, 1906, if as a matter of fact, this was public land of the United States and subject to the respondent's entry, then he should have required the Department to file that entry, by a proper mandamus; and not having done so, he acquired no right. He must have then occupied the land for a period of five years and made his final proof to the Department. Or to state it otherwise;—in order to acquire a title under the homestead law, the entryman must occupy and cultivate the land for a period of five years and that occupancy and cultivation must begin from his entry in the local land office; and if he never can obtain an entry in the local land office, he can never acquire a patent under the homestead laws

of the United States. Or, to state it in the language of the courts, in order to obtain a title in a proceeding such as the respondent has brought in the case at bar, he must show that at the time the patent was issued to your petitioners, that he had a complete equitable title to this land and that at the time the patent was issued, the department committed an error of law under the admitted facts, or facts found by the Department, and therefore erroneously awarded the title to these petitioners. Not having shown that the respondent had complied with the law, he cannot recover of course by showing that the patent should not have beeen issued to these petitionerrs.

Foster vs. Ingram, 178 Pac. 99. (Okla.)
Jones vs. Germania Iron Co., 107 Fed. 597.

FOURTH ASSIGNMENT OF ERROR.

The mere fact that under the Homestead Sections of the Statute, the Land Department of the Government may permit a homestead entryman to file on more land than he is entitled to, or may permit a man to file who, under the law is not entitled to file upon the land by reason of being a disqualified entryman; yet if the land office receives the application and issues a certificate of entry, that certificate is not void but is voidable only and segregates the land from the public domain of the United States.

Argument.

We take the position that the land department is the department of the Government having exclusive original jurisdiction as to the disposition of the public lands of the United States which comes under their jurisdiction; and it being conceded in the case at bar that the land was subject to be disposed of by the Department and the Department having received the entry and filed it, it segregated the land from the public domain of the United States, for the Department had jurisdiction of the land and a duty in the first instance to determine the qualification of the entryman. Therefore, their ruling cannot be void.

Oregon vs. Hitchcock, 202 U. S. 60.
Logan vs. Thomas, et al., 4 L. D. 441.

The last case holds that the mere fact that there is a surplus filing, does not make the surplus void, but only voidable and that the entire land is segregated from the public domain upon the entry being allowed.

We do not understand the distinction in principle from the contention that we make and in those cases where the Supreme Court of the United States holds that where an alien files upon the public lands of the United States and the disability is removed before any adverse right attaches, that that validates the entry; and in the case at bar it seems to us the

same principle will follow and we do not believe that this court intended to overrule such cases as *Manuel vs. Wulff*, 152 U. S. 505, 38 L. ed. 532; *McKinley Creek Mining Co. vs. Alaska United Mining Co.*, 183 U. S. 563, 46 L. ed. 331. These cases hold that where an alien files upon the public lands of the United States and the disability is removed prior to the inception of any adverse right, that that validates the entry.

These cases follow the land office decisions on the same subject.

McEvoy vs. Megginson, 29 L. D. 164.

We believe the court in this case would hold that even though the entry was erroneously allowed, that it could never be attacked by anyone with the exception of the Government. For instance, if Alexander J. Dickson had filed on 160 acres of land that he did not have a right to file on, it could have been canceled by the Government but we believe that it is good against all the world with the exception of the Government.

In an earlier case this court layed down the rule as follows:

> "Lands originally public cease to be public after they have been entered in the public land office and a certificate of entry obtained."
>
> *Hastings & Dakota Rr. Co. v. Whitney*, 132 U. S. 354, 33 L. Ed. 363.

It will be noticed that the Supreme Court of Oklahoma recognizes the law thus announced, except that it is claimed by the Supreme Court of Oklahoma that the entry of March 3, 1902 showed upon its face the disqualification of the respondent, Alexander J. Dickson; and therefore, the rule announced in these cases is not the law, while we contend that it makes no difference if the land is subject to be disposed of in that proceedings, and it is recognized by the Department and the certificate of entry issued, that the land thereafter ceases to be public land of the United States. The only exception to the rule is a case where the land is not subject to be disposed of by the department; and in such a case, the patent could be attacked in a collateral proceedings; but if the land is subject to be disposed of and the application is received by the department, a certificate of entry executed, that removes the land from the public domain; and that entry is subject to contest.

Of course, it will be noticed that the Supreme Court of the United States interprets *Hodges* v. *Colcord*, 193 U. S. 192, 48 L. Ed. 677, and the case that we have just cited, as making a distinction between entries void upon their face and otherwise; and the court is of the opinion that the Supreme Court of the United States makes that distinction and we will notice that in several cases, this court has used the expression "valid upon its face". This means that the land must be subject to be disposed of by the Department; and that is what the court

has in mind, as we understand these opinions of the Supreme Court of the United States, and of course, we think the Supreme Court of Oklahoma fell into an error in assuming that this application was void, for we find no decision of the Land Department, and we fail to find a decision of any court so holding.

The Supreme Court of Oklahoma, without discussion, seems to have reached the conclusion that this entry was void, while we say that it was only voidable at the time. We call the court's attention to *Wilcox* v. *Jackson*, 38 U. S. 498; *Witherspoon* v. *Duncan*, 71 U. S. 210; *Carroll* v. *Safford*, 44 U. S. 441. The latest case on the subject is *Swindig* v. *Washington Power Co.*, 265 U. S. 322. These cases show, in our judgment, that this court has never intended to and does not hold that it makes any difference what the entry may show if it is received and acted upon by the Department.

FIFTH ASSIGNMENT OF ERROR.

It will be observed that there is some contention made that because the entry of March 3, 1902 was void upon its face and did not segregate the land from the public domain of the United States and that Alexander J. Dickson was in possession of the land, that that gave him some right. We fail to find any law for such claim.

Argument.

Since the Act was amended on March 3, 1891, 26 Stat. L. 1097 cutting out the right of a preemptor to change his preemption entry to a homestead entry, no rights could be acquired by mere occupancy of the public lands of the United States; and no right could ever be obtained by the mere living upon the public land of the United States. The fact, therefore, that Alexander J. Dickson may have forcibly resided upon this land or resided on it peaceably for that matter, does not give him any rights under the homestead law of the United States.

All rights must date from the entry upon the public records of the United States; and until that record is obtained, no rights can be acquired.

> *Kansas P. & R. Co. v. Dunneyer,* 113 U. S. 629, 28 L. Ed. 1122.
>
> *Northern Pac. Ry. Co.* v. *Colburn,* 164 U. S. 383 41 L. Ed. 479.

The recent case on the subject is *United States* v. *Midwest Oil Company,* 236 U. S. 459, wherein this court said:

> "Prior to the initiation of some rights given by law, a citizen has no enforcible interest in the public statutes and no private right in the land which is the property of the people."

This court, in *Johnson* v. *Drew,* 171 U. S. 94, lays down the rule as follows:

> "A party cannot defend against a patent duly issued for land which is at the time a part of the public domain subject to administration by the land department, or disposal in the ordinary way upon the ground that he was in actual possession of the land at the time of the issuance of the patent."

It seems, therefore, that no rights of any kind could be acquired without an entry being obtained, which is the basis of the rights to a patent. Alexander J. Dickson could not have a court of equity declare the petitioners as trustees for his benefit without showing a complete equitable title; and this cannot be done by showing that he tendered an application which was rejected and the further fact that he resided upon the land, which is the entire basis of his claim in this case. He does not claim to have had an entry upon this land, while the petitioners claim that his entry of March 3, 1902 which was successfully contested by them, was a valid entry; and if we are in error on that point, then Alexander J. Dickson has never had an entry upon this land;—he merely tendered an application which was rejected, and says that he resided upon the property five years from said date, and it is upon this basis alone that he claims to have a right to maintain this action and have the court declare the petitioners holders of this property for his benefit under the law.

It will be conceded in this case that if his entry of March 3, 1902 segregated the land from the public domain of the United States, that it was subject to contest and your petitioners have a right to the patent. Therefore, it is unnecessary to discuss the rights of the petitioners under their successful contest, for that is not the contention. The contention is that the entry did not segragate the land, and therefore, that there was nothing to contest. If we are correct on that theory; that is to say, that it did segregate the land, then our rights as successful contestants, is conceded.

CONCLUSION.

It seems that from what we have said, the court will be able to get our view point as well as the view point of the respondent and will be able to say whether or not we are entitled to the writ prayed for.

Respectfully submitted,
CLAUDE NOWLIN,
S. A. HORTON,
O. C. WYBRANT,
CHAS. SWENDALL.
Counsel for the Petitioners.

No. 158

In the Supreme Court of the United States

OCTOBER TERM, 1923

SEWARD E. LOWE and SUSAN LOWE,
Petitioners,

vs.

ALEXANDER J. DICKSON,
Respondent.

BRIEF OF SUSAN LOWE

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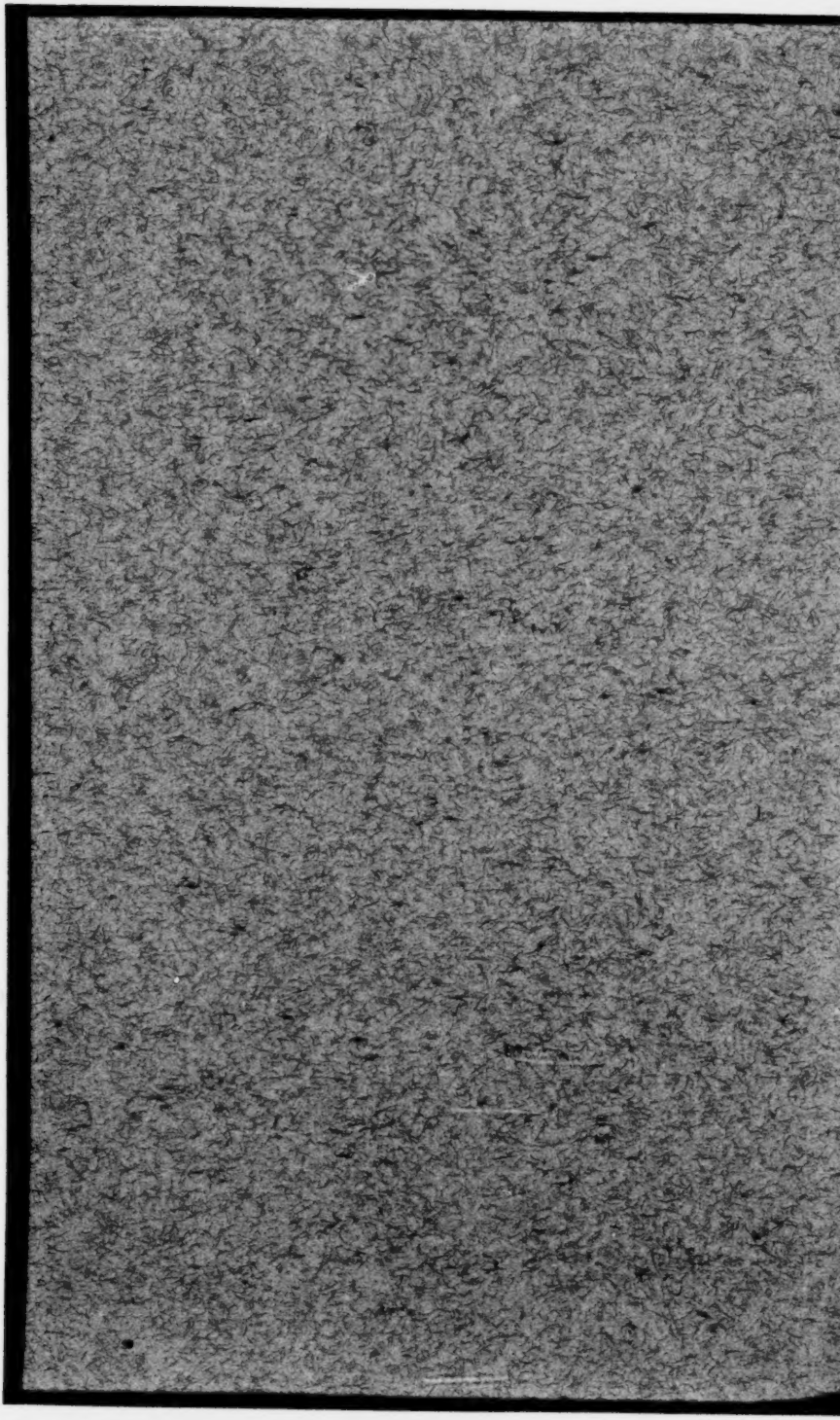

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NO. 580

In the Supreme Court of the United States

OCTOBER TERM, 1925

SEWARD K. LOWE and SUSAN LOWE,
Petitioners,

vs.

ALEXANDER J. DICKSON,
Respondent.

BRIEF OF SUSAN LOWE

STATEMENT OF FACTS

This presents a question arising under the Federal statutes known as the Homestead Statutes of the United States. There will be no question of jurisdiction to urge, and it will be unnecessary to discuss that feature, especially since jurisdiction appears from all pleadings and by the opinion of the Supreme Court of the State of Oklahoma.

The case was filed in the District Court of Beaver County, Oklahoma, by the respondent, Alexander J. Dickson, against Seward K. Lowe and Susan Lowe, seeking to have them declared trustees for Alexander J. Dickson,

for a tract of land in Beaver County, Oklahoma, which is the land in controversy, or, to state it otherwise, the case is a suit seeking to declare a resulting trust, upon the theory that while the patent to the land was issued to petitioner, Seward K. Lowe, that as a matter of fact and law, the patent should have been issued to Alexander J. Dickson.

The cause was tried by the District Court of Beaver County, Oklahoma, which court held that Alexander J. Dickson was the equitable owner of the land and entitled to relief asked for, and decreed Seward K. Lowe and Susan Lowe to be the holders as trustees for Alexander J. Dickson. Seward K. Lowe and Susan Lowe appealed to the Supreme Court of Oklahoma, and the trial court was affirmed by the Supreme Court of Oklahoma.

The Supreme Court of the State of Oklahoma passed upon but one assignment of error, and that was whether or not the petition stated a cause of action. The Supreme Court of Oklahoma held, as a matter of fact, the evidence established the facts pleaded in said petition. And within the time and in the manner prescribed by the rules of this Court, the petitioners filed their petition for writ of *certiorari*, which writ was granted on the 16th day of November, 1925. That on the 26th day of March, 1926, the joint petitioner, Seward K. Lowe, died. That on the 15th day of October, 1923, Seward

K. Lowe deeded the property described in these proceedings to Susan Lowe, and this proceeding is now being prosecuted by Susan Lowe as the owner of the property involved. Susan Lowe is the sole and only heir of Seward K. Lowe. The Supreme Court of Oklahoma held that the petition stated a cause of action, and that the evidence established the allegations of the petition. The amended transcript in this case constitutes largely the petition. Petition begins at Record 1 and runs to and includes part of Record 44.

Such being the situation, we don't feel that it would be of any advantage to this Court to copy in full this petition, but we do believe that by analyzing the petition, copying portions therefrom, we can concretely and concisely get before the Court what the facts were, which were considered by the trial court and the Supreme Court of the State of Oklahoma as the basis for their opinion.

(Record 1.) The petitioner alleges that he (Alexander J. Dickson) was a qualified entryman on July 2, 1906.

(Record 2.) That the land in question was subject to the entry on July 2, 1906; that he (Dickson) prepared and tendered to the Register and Receiver of the Land Office application for entry upon the land, and we desire to copy *verbatim* from the petition as follows (Record 2):

"* * * and that the said Register and Receiver, instead of accepting said application for entry on said land so presented and tendered, did wrongfully and erroneously reject and refuse said application, solely (fol. 31) for the reason that the said land was covered and segregated by the homestead entry of Alexander J. Dickson, this plaintiff, made on said land on the 3rd day of March, 1902, the same being Homestead Entry No. 11185 of the United States Land Office at Woodward, Oklahoma, and this plaintiff alleges that said action, ruling and order of the said Register and Receiver of the said Land Office at Woodward, Oklahoma, was erroneous and contrary to law, for the reason that said Entry No. 11185 was null and void, and that the invalidity of said Entry No. 11185 appeared upon the face of the entry papers and upon the face of the record required by law to be made and kept by the Register and Receiver of said land office."

He then alleges (Record 2) that on the 22nd day of May, 1894, he was qualified entryman, and that he had entered a certain land described (not tract in question), and for that reason he had already exhausted his homestead rights, and that he was therefore disqualified on the 3rd day of March, 1902, to make homestead entry, and therefore said entry made on the 3rd day of March, 1902, was void, and showed to be void upon the face of the record.

He attached all of the proceedings to the petition and refers to "Exhibit B" (Record 10), and the statement therein, which is as follows:

"* * * and that I have not heretofore made an entry under the homestead laws, except I filed W½

NW¼ and SW¼, Sec. 15, being 3 miles from west and eight miles from the north line of Woodward County, and paid out on it about three years ago."

Thus it is contended that the application of February 27, 1902, which was accepted by the local land office March 3, 1902, filed and a certificate of entry given to him, was void, because he was then disqualified to file a homestead entry, having already exhausted that right and that by reason of the fact that the affidavit, "Exhibit B" (Record 10), showed on its face that he was so disqualified. Therefore, his disqualification showed on the face of the record that the entry proceedings were void.

Dickson alleges that he had exhausted his homestead rights on the 27th day of February, 1902, and that his application was thus void, but (Record 4) the Congress of the United States passed an act on the 22nd day of May, 1902, permitting persons who had already filed on 160 acres to file upon an additional 160 acres, thus removing his disqualifications, and therefore, his conclusion is that by virtue of his being disqualified on the 27th of February, 1902, and March 3, 1902, that everything that was there done was void, and that even though the department had filed this application and a certificate of entry had been issued, and notwithstanding the fact that the petitioner had filed a contest against him, based upon

that application of March 3, 1902, on the ground of non-cultivation, and that he (Dickson) had defended that contest, and had carried it through all the departments of the Government, still it was all void and it amounted to nothing, as a matter of law or fact, and that on the 2nd day of July, 1906, this was unappropriated public land of the United States, which contention was sustained by the Supreme Court of Oklahoma, and that the Register and Receiver of the Land Office erred, as a matter of law, by not filing his application of July 2, 1906, and not disregarding all of the other proceedings, as absolutely void.

The opinion of the Supreme Court of Oklahoma in this case has not been officially published, but it is found in Pacific Reporter, West Publishing Company Edition, Volume 236, at page 399, filed December 9, 1924, and the opinion is set out in full in this transcript, and begins at Record 45 and concludes at Record 54.

The learned Supreme Court of the State of Oklahoma took the view that by reason of the fact that the statement was in the application of February 27, 1902, that we have set forth, that this application was void, and showed on its face to be void; that the contest that was instituted thereon was void; that petitioner (Lowe) did not acquire any right by reason of that contest, and that the respondent, Alexander J. Dickson, was the owner

of this land, and that the petitioners, Seward K. Lowe and Susan Lowe, were holding it as trustees.

The trial court and the Supreme Court of the State of Oklahoma, erred in not holding that his application of July 2, 1906, was rightfully rejected for two reasons:

A. That there was a rule of the department then in force which prevented the filing of any application by the local receiver and register, so long as there was an uncancelled entry of record.

B. Conceding that he was disqualified on March 3, 1902, by reason of the fact that he had already exhausted his homestead rights by filing upon 160 acres and receiving a patent therefor, but nevertheless when his disability was removed by the Act of Congress on May 22, 1902, it related back and validated the entry of March 3, 1902.

ARGUMENT

We believe that it will appear from what we have said that the basis of the petition of the plaintiff and the theory is that since Alexander J. Dickson was disqualified on March 3, 1902, and that appeared on the record that the entire proceedings were void, and that the register and receiver wrongfully rejected his application that was tendered on July 2, 1906. If the register and receiver were correct in rejecting this application, then his case is ended. The Supreme Court of the United

States has used the expression a number of times in reference to this matter, valid on face of record, which the Supreme Court of Oklahoma construed to mean that the rules of the Land Department prohibiting the filing of any application so long as there was an uncancelled application on file only applied in cases where the proceedings were not void upon the face of the record, and therefore, these decisions of this Court were not controlling here. As we understand it, from the various arguments that have taken place, if the application found at Record 10 had not contained the statement that Alexander J. Dickson had already homestead d 160 acres of land that the judgment of the Supreme Court would have been that the proceedings were not void on their face. *Holt* v. *Murphy*, 207 U. S. 408, would have applied and have been controlling. The opinion of the Supreme Court of Oklahoma is copied, as we have already suggested, at Record 45 to 54, and we want to copy the syllabus of that opinion (R. 45 and 46), which is as follows:

> "1. Where an application for homestead entry upon the lands of the United States is made by one who, under existing laws of the United States, is disqualified from making such application, the same is void.
>
> "II. An application for homestead entry upon the lands of the United States which is void when made, is not rendered valid by a subsequent law removing the disqualification of the applicant.

"III. Where the application for homestead entry and the records of the land office disclose upon their face that such application is void, the land covered thereby is not segregated nor withdrawn from settlement by reason of such void application.

"IV. The fact that one has entered upon and is holding lands of the United States under *hom*stead application which is void upon its face, does not authorize a contest upon the ground of failure to cultivate, and one instituting such contest obtains no preferential right thereby.

"V. The principal is well settled that where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner and compel him to convey the legal title. *Prosser* v. *Finn*, 208 U. S. 67."

On the second proposition which we have suggested, that the removal of his disability or disqualification related back and validated the entry of March 3, 1902, we copy from the record at page 50, which is a part of the opinion of the Supreme Court of Oklahoma, and which Court quotes there from the opinion of the Commissioner. That portion of the opinion of the Supreme Court is as follows:

"That his second entry of March 3, 1902, became good on passage of the Act of May 22, 1902, is clear upon the decisions cited by your office. Having a record entry which he was asserting, the act granting a second right, in absence of any adverse right, cured all the infirmity of the entry at its initiation. (Foregoing is Commission opinion.)

"This brings us to the question submitted by the

above quotation, which is whether the original void entry was validated by a subsequent act which would render the plaintiff qualified to make the entry. The holding of the department that the original void entry was so validated is supported by a number of decisions of the Land Department and some of them are cited in the matters above quoted. These opinions are entitled to great weight and should not be overruled except for cogent reasons, and unless it be clear that such construction is erroneous. *United States* v. *Johnson,* 128 U. S. 31 L. Ed. 389. But a different conclusion in the case of *Prosser* v. *Finn,* 208 U. S. 67, 52 L. Ed. 392, and the law as laid down in that case is binding upon us here."

It will be observed from the foregoing quotation that this proposition is based on the decisions of this Court in the case of *Prosser* v. *Finn,* 208 U. S. 67. Our contention is that *Prosser* v. *Finn, supra,* has no application at all under the homestead laws that we have under consideration, and to us it is very clear that *Prosser* v. *Finn, supra,* is limited and applies entirely to the Act of April 25, 1812, being Section 452 of the Revised Statutes, Chapter 68, 2 Stat. L. 717, which is as follows:

"The officers, clerks and employes in the general land office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land, and any person who violates this section shall forthwith be removed from his office."

The foregoing proposition presents the proposition which was decided by the Supreme Court of the State of

Oklahoma. Still, even if we are in error, the following propositions are conclusive in favor of petitioner:

1. That this application having been filed and acted upon by the Register and Receiver of the Land Office, was not void.
2. He alleges in his petition that he never did have a valid filing upon the land, therefore he could never acquire title to the land under the homestead law.
3. He doesn't allege that he ever made proof of occupation or cultivation, or tendered the same to the Government office, or otherwise followed the laws of the United States, but set them out as copies to his petitions, and seeks to make his proof in the court in this proceeding, which cannot be done.
4. That his petition in such a case at this must show upon its face that he was entitled to the patent, and the fact that he may show that the respondents were not entitled to a patent doesn't benefit him.

Illustrative of the point we are trying to make, the statutes of the United States, which we will set out, provide that he must file an affidavit with witnesses, showing that he had resided upon and cultivated the land, with other facts, which showing and affidavit must be filed with the land office, but in lieu thereof he filed that affidavit with the District Court of Beaver County, Oklahoma, which affidavit is found at Record 38 and 39, and in view of the importance of this, according to our theory, we desire to copy that affidavit, which is as follows:

"State of Oklahoma, Beaver County, ss:

"I, Alexander J. Dickson, having heretofore, on the 2nd day of July, 1906, made application to make a homestead entry of the S½, SW¼, SW¼, SE¼, Section 15, and NW¼, NE¼, Section 22, in Township 5 North, Range 28 East, C. Meridian, subject to entry at Woodward Land Office under Section No. 2289, Revised Statutes of the United States, and now having instituted suit to obtain title therefore, do solemnly swear that I am a native born citizen of the United States, that I made actual settlement upon said land and have cultivated and resided upon said land from the 2nd day of July, 1906, until about the 1st day of May, 1917, that no part of said land has been alienated, but that I claim to be the sole equitable thereof, that I will bear true allegiance to the Government of the United States, that I further swear that I have not heretofore perfected or abandoned an entry under the homestead laws of the United States, except I perfected homestead entry No. 509 in the Woodward Land Office at Woodward, Oklahoma, and thereafterwards made entry No. 11185, and afterwards sought to make entry referred to on July 2, 1906, for the same lands, upon the grounds that said entry No. 11185 was void.

"Alexander J. Dickson.

"Subscribed and sworn to before me this the 23rd day of April, 1922.

"Jessie Keith Stewart, Court Clerk,
(Seal) "Beaver County, Oklahoma."

It will be noticed that it was sworn to before the court clerk and filed in the District Court of Beaver County, Oklahoma, and he alleges at Record 8 as follows:

"Plaintiff further alleges that he resided upon, cultivated and improved the said tract of land herein first described and for which he now sues, and improved the

same in all respects in full compliance with the laws of the United States entitling him to make homestead entry thereof from and after the 2nd day of July, 1906, and until the 1st day of May, 1917."

SUMMARY OF THE ALLEGATIONS

That he was a citizen of the United States and qualified to make an entry upon the public lands of the United States.

That he made an entry upon 160 acres of land in 1894.

That he paid it out and received a patent therefor.

That on the 27th day of February, 1902, he made an application to file upon the land in question, which application was received by the proper Register and Receiver of the Land Office, filed and certificate issued on March 3, 1902.

That on July 2, 1906, he tendered application to the Land Department, and asked that he be permitted to file upon the land, which was refused. That thereafter, he resided upon the land, but never made any application to the department, never made any proof of his residence and occupation and cultivation, and then goes into the District Court of Beaver County and seeks to plead all the facts and to show his residence and cultivation and

occupation of the property in the court, totally disregarding the land department. His contention is that all he need to do is to have his application rejected; he could substitute the court for the land department, and prove all that was necessary to be proved before the land department in the court, thus eliminating the land department of the Government.

From what we have said and from what we have copied from the petition in the case, we feel that the Court can now see what the facts are as well as the respective contentions of the parties. The object and purpose of a brief is to assist the Court so far as it is possible to get the actual facts and actual contentions of the parties before the Court, so that the Court can, without any unnecessary time being spent, determine the controversies between the parties.

ASSIGNMENTS OF ERROR

Assignmnts of error and points of law we desire to present are set forth in the record at pages 55 to 57, and we desire to consolidate some of these for argument, but the assignments of error are as follows:

Assignments

"First: The Supreme Court of the State of Oklahoma erred in holding that the second amended and supplemental petition with exhibits thereto attached, stated

a cause of action in favor of Alexander J. Dickson and against the petitioners, Seward K. Lowe and Susan Lowe.

"Second. The Supreme Court of Oklahoma should have held that the second amended and supplemental petition not only failed to show a cause of action, but affirmatively showed that the judgment and findings should have been in favor of the petitioners, Seward K. Lowe and Susan Lowe.

Specific Points of Law Presented.

"Third: Where an application is tendered to the proper land office and is received by the proper land office and a certificate of entry issued covering public land of the United States, and it appears that the entryman was disqualified because he had already filed upon 160 acres of land, but before any adverse rights attach, this disqualification is removed, that removes the disability and validates the entry.

"Fourth: That at the time the application was made in the case at bar, there was a valid rule of the department in force which prevented the filing of any additional application until all of those which were (fol. 317) already filed had been cancelled; and on July 2, 1906, at the time the application of the respondent was tendered, he, the respondent, had an uncancelled entry of record which he was asserting, and therefore, the department did not commit an error of law in refusing to file his entry of July 2, 1906, but it was rightfully refused and therefore no right accrued to the respondent by the tendering of the same.

"Fifth: That no rights can be acquired by tendering to the Department of the Interior of the Land Office an application to file under the Homestead Laws of the United States where such application is rejected by the proper land office.

"Sixth: That no rights can be acquired under the

homestead provisions of the laws of the United States which govern this proceeding, without a five-year occupancy of said land by the homesteader, which occupation cannot begin until the homesteader has a filing in the proper land office; and the respondent contending that he never had a filing in the proper land office, therefore he has never occupied the land according to his contention, and therefore no rights that can be asserted in this case, and the judgment, therefore, must be for the petitioners.

"Seventh: That a suit to declare a resulting trust such as we have in the case at bar, the court cannot receive evidence of cultivation, occupancy and other requirements necessary to be shown before a patent can issue. Such proof must be presented to the proper land office, the land department being the department of the Government specifically authorized to determine such questions of fact, and the court cannot be substituted for the department.

"Eighth: That in a suit to declare a resulting trust, where the petition shows that the plaintiff is seeking to have the court hear and determine his final proof as provided for under Sections 2289, 2290 and 2291 of the Revised Statutes of the United States, and Section 1 of the Act of March 3, 1877, and Section 1 of the Act of March 3, 1879, the petition clearly shows that the court is without jurisdiction or authority to entertain the petition. This is especially true in the absence of an allegation that this proof and affidavit had been tendered to the proper department officer and by them rejected.

"Ninth: That where public land of the United States is subject to be disposed of in the proceedings wherein the application is made and an application is presented to the proper land office, and the land office entertains said application, files the same and issues a certificate of entry, the land is withdrawn from the public domain of the United States, and the mere fact that the

entrymen may be disqualified does not change the rule, for the entry is not void, but (fol. 318) merely voidable.

"Tenth: Where an applicant makes proper affidavits under the homestead laws of the United States to enter upon the public land, and his application is received and a certificate of entry is issued, even though erroneously by reason of the fact that the records of the land office showed that he had already exhausted his rights, and therefore was a disqualified entryman, still where that disqualification was removed before any adverse rights intervened, this would validate his entry unless he was disqualified under Section 452 of the Revised Statutes of the United States, which prohibits employes of the land office from becoming interested in the public lands of the United States."

FIRST ASSIGNMENT OF ERROR

The learned District Court of Beaver County in the State of Oklahoma and the learned Supreme Court of the State of Oklahoma, erred in holding that the petition stated a cause of action and entitled the respondent Alexander J. Dickson to a judgment declaring a resulting trust, and in holding that the defendants, Seward K. Lowe and Susan Lowe, are trustees for his benefit for the reason that the petition fails to state facts which would justify said judgment or any judgment.

Argument

The foregoing is the only assignment of error that is in this case; the only proposition decided, since the facts are all set up in the petition. Several points of law which would be properly considered under this assignment of error, or to state it otherwise, there are several different propositions of law that we are presenting

separately showing that said petition doesn't state a cause of action.

FIRST PROPOSITION OF LAW

The Department of the Interior in the case at bar held that though the respondent's entry on March 3, 1902, was erroneously allowed, yet the disability of the respondent having been removed on May 22, 1902, that validated his entry; and that on January 28, 1905, the respondent had an entry on file that was valid and was subject to Lowe's contest, and therefore, the land was not subject to entry on July 2, 1906, and therefore the department was right in refusing to file his application which was tendered on July 2, 1906.

This proposition of law simply presents the well-recognized principle that the departmental rulings are recognized as the law, and that the department had held at all times that the removal of the disability related back to the inception of the invalid entry and cured the defect. The Supreme Court of the State of Oklahoma would have held in this case that the petition did not state a cause of action, but for the fact that the Supreme Court of the State of Oklahoma misconstrued the opinions of this Court, according to our understanding of this Court's opinions. This whole proposition will be very clear to the Court by turning to Record 50-51-52-53-54, where opinion of Supreme Court will be found. It will be observed that the Supreme Court of Oklahoma holds, finds and sets out the rulings of the Department of the

Interior holding that the Act of Congress removing the disability related back and cured and validated the original entry. But they say that this Court has held otherwise in *Prosser* v. *Finn,* 208 U. S. 67, 52 Law Ed. 392. In our opinion, *Prosser* v. *Finn* has no application at all to this case, and the discussion in that case doesn't refer to any state of facts such as we have here. It may be that we have entirely misconceived the proposition, but it will be observed that the land department has never noticed *Prosser* v. *Finn, supra,* as having any application under the homestead laws of the United States, other than Section 452.

It is obvious to us that the Supreme Court of Oklahoma did misconstrue *Prosser* v. *Finn,* 208 U. S. 67.

The policy of the land department has always been to encourage homestead settlers upon the public lands of the United States; but public policy would prevent employes of the land department from taking advantage of confidential information they might obtain while with the department; and therefore, on April 25, 1812, Congress of the United States passed Section 452 of the Revised Statutes, being the Act of April 25, 1812, Chapter 68, 2 Stat. L. 717, which is as follows:

> "The officers, clerks and employes in the general land office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land, and any person who vio-

> lates this section shall forthwith be removed from his office."

It would be rather a burdensome task to read all of the decisions of the department under that section, so that we could make the positive statement that every single decision of the department since the passage of this act has held that no right could be acquired by an employe of the land department by reason of the prohibitive language of this statute and the evident policy of Congress as indicated by its enactment. *Prosser* v. *Finn*, therefore, merely follows the land office decisions in that construction of that section of the Federal statutes.

Mr. Justice Harlan, in the case of *Prosser* v. *Finn*, *supra*, states:

> "This case depends upon the construction to be given to Section 452 of the Revised Statutes. If Prosser's original entry was forbidden by the above statute, then nothing stood in the way of that entry being cancelled by order of the Secretary of the Interior in a proceeding that directly involved its validity."

The real question decided in *Prosser* v. *Finn*, *supra*, was whether or not Prosser was an employe under Section 452 of the Revised Statutes. The Court, in that case, held that he was such employe, and therefore was within the prohibitive terms of the statute. The case of *Prosser* v. *Finn* and Section 452 of the Revised Statutes were

carefully considered by this Court in *Waskey* v. *Hammer*, 223 U. S. 85, wherein the reasons for construing the statute as prohibitive and explaining somewhat the decision of *Prosser* v. *Finn*, were discussed; these decisions show clearly that this Court did not intend to hold that where an entryman under the homestead section was disqualified and his disqualifications were removed prior to the initiation of any adverse right, that that would not validate the entry, except as to person coming within the provisions of Section 452, *supra*.

The department has been holding that where the disabilities were removed before the initiation of an adverse right, that that validated the entry, beginning with James F. Bright, 6 L. D. 602, decided March 31, 1888, including the case at bar, and the last case in *Dillard* v. *Hurd*, 46 L. D. 41, decided March 14, 1917. The rule there announced is as follows:

> "A contest brought upon the ground that the entryman is a minor and not the head of a family must fail where prior to the filing of contest affidavit, the entryman attains his majority.
>
> "Where one under 21 years of age and not the head of a family is permitted to make a homestead entry, but attains his majority before the filing of a contest, affidavit charging failure to reside upon and cultivate the land as required by law, such contest must fail if six months had not elapsed since the entryman became 21 years of age."

It will be noticed that *Prosser* v. *Finn*, *supra*, was

decided January 13, 1908. The Department of the Interior has never referred to that decision as having any application under the homestead provisions of the statute, except under Section 452.

On March 15, 1915, the matter was before the Federal Court in the case of *United States* v. *Hodgman,* 221 Fed. 1018, where the same principle was followed, and the earlier cases from this Court cited. No reference to *Prosser* v. *Finn.*

In a very recent case from the Supreme Court of Colorado entitled *Huff* v. *Greis,* 203 Pac. 677, the Supreme Court of Colorado held under the homestead sections of the statute that the disability being removed prior to the advent of any adverse right, validated the entry, citing 46 L. D. 41, and also *In re James F. Bright,* 6 L. D. 602.

We are not unmindful that the mere fact that the land department has not changed its rulings or referred to *Prosser* v. *Finn, supra,* since it was handed down under any other section than 452, does not bind this Court; we are also aware that the mere fact that the Supreme Court of Colorado may have followed the rulings of the land department erroneously does not require this Court to follow these decisions; but it is convincing to us that our understanding of what the Supreme Court

of the United States held is correct, and that is, that the decision of *Prosser* v. *Finn, supra,* has no application except under Section 452.

We don't understand that *Prosser* v. *Finn, supra,* intended to overrule such cases as *Moses Manuel* v. *Iver Wulff*, 152 U. S. 505, 38 L. Ed. 532, wherein this Court says:

> "Where a citizen of the United States located a mining claim and conveyed the same to an alien, the naturalization of the latter, before a decision against him in favor of another claimant, removed his disability as an alien to take the title."

It will be observed that this Court in that case quoted the land office decision, which has been followed ever since, and the earlier cases from this Court, beginning with 4 L. D. 564.

We are unable to distinguish the difference between a case where the entryman was disqualified on the ground that he had already exhausted his right, and an alien who had no right to begin with. So far as we have been able to find, no court has found that the application would be void. See *McEvoy* v. *Megginson,* 29 L. D. 164.

It will also be noticed that the Supreme Court of the State of Oklahoma holds that these cases are not in point, because the application was void. We don't understand that that is the rule. The only instance where the appli-

cation would be void would be cases where the land was not subject to disposition by the Government in that proceeding. If the land was not subject to be disposed of by the department at the time of the proceedings, necessarily it would be void. But here the land was subject to be disposed of, and on that point we find the United States speaking on the subject in *McKinley Creek Mining Co. et al.* v. *Alaska United Mining Co.*, 183 U. S. 563, 46 L. Ed. 331, wherein the Court said:

> "The location of a mining claim by an alien and the rights following therefrom, are voidable, not void, and are free from attack by anyone except the Government."

It seems to us, therefore, that this case is conclusive against the contentions of Alexander J. Dickson on two points; one of them is that this was not void, and again, that this question could only be raised by the United States Government. If either proposition be the law, as we understand it to be, then they are both conclusively against the contention here made. We also invite the Court's attention to *Oregon* v. *Hitchcock*, 202 U. S. 60.

The Supreme Court of Oklahoma, without discussion, seems to have reached the conclusion that this entry was void, while we say that it was only voidable at the time. We call the Court's attention to *Wilcox* v. *Jackson*, 38 U. S. 498; *Witherspoon* v. *Duncan*, 71 U. S. 210; *Carroll* v. *Safford*, 44 U. S. 441. The latest case on the sub-

ject is *Swindig* v. *Washington Power Co.*, 265 U. S. 322. These cases show, in our judgment, that this Court has never intended to do and does not hold that it makes any difference what the entry may show if it is received and acted upon by the department.

This Court also holds:

> "Lands originally public cease to be public after they have entered in the public land office and a certificate of entry is obtained."
>
> *Hastings & Dakota R. R. Co.* v. *Whitney*, 132 U. S. 354, 33 L. Ed. 363.

Of course, we are not unmindful that the Supreme Court of the State of Oklahoma recognized the argument that we are making, but claim that it was void on its face, and therefore that these authorities that we have cited are not in point. It may be that we are in error, but it looks to us like it wouldn't make any difference. Besides we have case after case where there is a minor filed on public lands of the United States, but before the patent is issued he reaches his majority. Then, of course, the department holds as a regular policy that the removal of his disability validates his entry, and we are unable to see any reason why that wouldn't be the rule here, and the mere fact that his minority did not show on his application, or the fact that his application was made and didn't show that he was an alien or he was a minor didn't make any difference.

We are certainly unable to agree with the Supreme Court of the State of Oklahoma on this proposition, and we are also unable to agree with the Supreme Court of Oklahoma that *Prosser* v. *Finn, supra,* intends to overrule these cases, or the departmental decisions which hold that the removal of the disability validated the original entry. We are strengthened, of course, in our views by the fact that *Prosser* v. *Finn* has not been referred to by the department, nor any other court, as having any application under any other section other than 452. The department has consistently followed the same rule, and it would be quite unreasonable to conclude that *Prosser* v. *Finn, supra,* had not been called to the attention of the department. It would be much more reasonable, in our judgment, to conclude that the department holds as we do, that it doesn't have any application, except by those cases that come within the prohibited provisions of Section 452.

SECOND PROPOSITION OF LAW

That at the time the application was made in the case at bar, there was a valid rule of the department in force which prevented the filing of any additional application until all of those which were already filed had been cancelled; and on July 2, 1906, at the time the application of the respondent was tendered, that he, the respondent, Alexander J. Dickson, had an uncancelled entry of record which he was asserting; and therefore, the department did not commit an error of law refusing to file his application of July 2, 1906, but it was rightfully refused, and therefore no right accrued to the respondent by the tendering of the same.

Argument

The Supreme Court of the State of Oklahoma held that this entry was void upon the face of the record, and therefore that this application, which was filed March 3, 1902, didn't segregate the land from the public domain of the United States. Therefore the departmental rules did not apply, for the land was not segregated. The departmental rule is as follows:

> "In order that this important matter of regulation may be perfectly clear, it is directed that no application will be received, or any rights recognized, as initiated by the tender of an application for a tract embraced in an entry of record, until said entry has been cancelled upon the records of the local office. Thereafter, and until the period accorded a successful contestant has expired, or he has waived his preferred right, applications may be received, entered, and held subject to the rights of the contestant, the same to be disposed of in the order of filing upon the expiration of the period accorded the

successful contestant or upon the filing of his waiver of his preferred right."

Published July 14, 1899, 28 L. D. 516-519.

Our contention is that this rule is a reasonable one, and that it doesn't make any difference how the entry got upon the record, if there was an application under the homestead law presented to the Register and Receiver of the Land Office; it was acted upon by them, received and filed and a certificate of entry issued. If the land was subject to be disposed of by the department, then the rule that we have set forth would prohibit the filing of any application so long as that filing remained uncancelled of record. In this case, the department found, and that is pleaded, that the respondent, Alexander J. Dickson, was asserting his rights under the filing of March 3, 1902. That entry remained uncancelled. When he tendered his application on July 2, 1906, there was the uncancelled filing of March 3, 1902, of record. If this rule was a valid one, necessarily there was no error in rejecting his application at that time. If, therefore, there was no error in rejecting his application, then of course the respondent must fail, because his entire case depends upon the wrongfulness of the rejection of his tendered filing on July 2, 1906.

The departmental construction of that rule is as follows (34 L. D. 12):

"Pending the disposition of a school land indemnity selection, even though erroneously received, no other application including any portion of the land embraced in such selection should be accepted, nor will any rights be considered as initiated by the tender of any such application."

It will be observed, therefore, that on July 2, 1906, regardless of any other feature, the land department would have denied his application under the rule which was then in force; so it makes no difference whether the entry was void, valid, or what might have been its status, so long as it was uncancelled, no further entry could be received, and if this is a correct proposition of law and these rules and regulations are valid rules and regulations, then the respondent has no standing, for the reason that the land was not subject to his application for entry on July 2, 1906.

This Court has determined this point in our favor, as we understand it, in the case of *Holt* v. *Murphy*, 207 U. S. 408, 52 L. Ed. 271, wherein Mr. Justice Brewer, speaking for this Court, said:

"A soldier's declaratory statement filed during the time allowed for an appeal to the Secretary of the Interior from a decision of the Commissioner of the General Land Office against the validity of a prior homestead entry confers no rights upon the applicant, where, by a rule of the land department in force when a patent for the land is finally issued, no application will be received or any rights recognized as initiated by the tender of an application for

> a tract embraced in an entry of record until said entry has been cancelled from the records of the local office."

It seems to us that this decision very clearly and forcibly established the law in favor of your petitioners. That is to say, that the land department had authority to make the rule above set forth and had a right to enforce it; and if such be the law, then on July 2, 1906, there was an uncancelled entry of record, and therefore the Department of the Interior committed no error of law in refusing to file the application thus tendered; and therefore, the respondent must fail regardless of any other legal points there is involved in this case, for he clearly states in his petition that the entry of March 3, 1902, being void, did not segregate the land from the public domain of the United States, and the Department of the Interior committed an error of law in not receiving his application of July 2, 1906, and that is the basis of this law suit.

In a very recent case, this Court has had occasion to remark that the Court would not overthrow the rules and regulations and the decisions of the department where they were of long standing. The rule announced under the first assignment of error in this brief has been followed since 1888, and the rule under this assignment has been followed an almost equal length of time. In-

structive recent cases on the points involved in this case are:

McLain v. *Fliecher,* 256 U. S. 477.
Brown v. *United States,* 113 U. S. 571.
Wells v. *Fisher,* 47 L. D. 228.
Logan v. *Davis,* 233 U. S. 613.
Fisher v. *Rule,* 248 U. S. 314.

By way of illustration—if the respondent's contention is true, then we may eliminate entirely the petitioners, and for a moment forget that they ever contested this entry—that the entry of March 3, 1902, was never made, for that is the legal effect of the contention of the respondent. On July 2, 1906, he being on the land, he tenders his application, which was rejected by the land department. It would be interesting for him to explain how he would get title to this land under his theory. He could not file this kind of a suit, because there would be nobody to be declared as trustee; it merely shows the unsoundness of his contention, for under his theory he had no filing on the land; there was nobody he could bring a suit against; he could make no final proof before the department. We might explain what we think about it here. If his contention is true, he should have mandamused the department and required them to file his application, and that is his only remedy, because he can

never acquire title to this property until he gets a valid entry, or filing with local land office.

Payne, Sec'y, v. *United States,* 255 U. S. 438.

If this land was subject to Dickson's application of July 2, 1902, the land office was without discretion, and could have been required to file his application.

Work, Sec., v. *Reid,* 10 Fed. (2nd) 637.

FOURTH PROPOSITION OF LAW

That no rights can be acquired by tendering to the Department of the Interior or Land Office an application to file under the Homestead Laws of the United States, where such application is rejected by the proper land office.

Since the act was amended on March 3, 1891, 26 Stat. L. 1097, cutting out the right of a preemptor to change his preemption entry to a homestead entry, no rights could be acquired by mere occupancy of the public lands of the United States, and no right could ever be obtained by the mere living upon the public land of the United States. The fact, therefore, that Alexander J. Dickson may have forcibly resided upon this land or resided on it peaceably for that matter, does not give him any rights under the homestead law of the United States.

All rights must date from the entry upon the public records of the United States, and until that record is obtained, no rights can be acquired.

Kansas P. & R. Co. v. *Dunneyer,* 113 U. S. 629, 28 L. Ed. 1122.

Northern Pac. Ry. Co. v. *Colburn,* 164 U. S. 383, 41 L. Ed. 479.

The recent case on the subject is *United States* v. *Midwest Oil Co.,* 236 U. S. 459, wherein this Court said:

> "Prior to the initiation of some rights given by law, a citizen has no enforcible interest in the public statutes and no private right in the land which is the property of the people."

This Court, in *Johnson* v. *Drew,* 171 U. S. 94, lays down the rule as follows:

> "A party cannot defend against a patent duly issued for land which is at the time a part of the public domain subject to administration by the land department, or disposal in the ordinary way upon the ground that he was in actual possession of the land at the time of the issuance of the patent."

It seems, therefore, that no rights of any kind could be acquired without an entry being obtained, which is the basis of the rights to a patent. Alexander J. Dickson could not have a court of equity declare the petitioners as trustees for his benefit without showing a complete equitable title, and this cannot be done by showing that he tendered an application which was rejected and the further fact that he resided upon the land, which is the entire basis of his claim in this case. He does not claim to have had an entry upon this land, while the petitioners claim that his entry of March 3, 1902, which was

successfully contested by them, was a valid entry; and if we are in error on that point, then Alexander J. Dickson has never had an entry upon this land. He merely tendered an application, which was rejected, and says that he resided upon the property five years from said date, and it is upon this basis alone that he claims to have a right to maintain this action and have the Court declare the petitioners holders of this property for his benefit under the law.

A very recent case by this Court, entitled *Great Northern Railroad Co.* v. *Reid,* 46 Sup. Ct. Rep. 380 (not officially reported, as we are able to find), in which this Court lays down the rule as follows:

> "A settler within the homestead law comprehends acts done to establish actual personal residence on the land."

This case illustrates, very forcibly, two contentions made by us. In the first place, that in the construction of the homestead statutes, the courts and the department are very lenient with the homesteader, and it is by reason of this leniency that the courts and the department hold that where the disability is removed that that relates back to the initiation of the right. This case also illustrates our contention, and that is that in order to acquire title under the homestead law there must be a reasonable compliance with the homestead statute. We find a man here seeking to claim that by tendering an application

to the land department, even though it is rejected, that he can thereafter, without paying any further attention to the land department or the rules and regulaions of the department or the statutes of the United States, go into the court of equity and establish his title. Of course this is the first instance on record where anybody has ever attempted such a thing. That this Court may have the benefit of all the cases from this ›urt, discussing the rights of the entryman, the effect of filing this certificate, we want to note at this point *Swindig* v. *Washington Power Co.*, 265 U. S. 322; *Wells, Administrator,* v. *Bodkin et al.*, 267 U. S. 474.

The department has recently laid down the rule as follows:

> "Complete equitable title does not vest until final proof is submitted to proper land offices."
>
> *Columbus C. Malby,* 48 L. D. 287.
>
> *Cleveland Johnson,* 48 L. D. 18.

Many of the cases are discussed as well as the rulings of the land department in the case of *Holt* v. *Murphy,* 15 Okla. Rep. 12. Mr. Justice Haner, speaking for the Court, said:

> "Where an application to enter land already covered by a homestead entry is received by the local land office and rejected, and an appeal is taken from such action, it is not a pending application that will attach on the cancellation of the previous entry,

since the appeal cannot operate to create, as a matter of law, any right not secured by the application."

The Court will bear in mind that we have already suggested that the preemption statute, which permitted a settler to settle upon the public lands of the United States, and by so doing acquire some interest, was repealed by the Act of March 3, 1891, Chapter 561.

At this time, by way of illustrating our point, which is that no rights can be acquired under the homestead statute of the United States unless you have a filing under the statute, unless you make your proof before the statute, unless you comply with all the statutes on the subject, we deem it important to set out these statutes, and of course you will appreciate the fact that we understand that this Court is familiar with these statutes, but when the trial court, that is, the District Court of Beaver County and the Supreme Court of the State of Oklahoma, holds against us as to our understanding of the rules and regulations under these statutes, and also holds against us in our interpretation and understanding of the opinions of this Court, then since the statutes are the basis of this contention, we feel that the Court will pardon us if we set these statutes out in full. They might be set out as an appendix in this brief, but we are going to conclude this brief by setting out these statutes. We have already set forth Section 452. Section 2289, as

amended by the Act of March 3, 1891, Chapter 561, Section 5, 26 Stat. L. 1097, is as follows:

> "Every person who is the head of a family, or who has arrived at the age of twenty-one years and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one-quarter section, or less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands, but no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory shall acquire any right under the homestead law. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres."

Section 2290, as amended by the Act of March 3, 1891, Chap. 561, Sec. 5, 26 Stat. L. 1098, is as follows:

> "That any person applying to enter land under the preceding section shall first make and subscribe before the proper officer and file in the proper land office an affidavit that he or she is the head of a family, or is over twenty-one years of age, and that such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons or corporation, and that he or she will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence and cultivation necessary to acquire title to the land applied for; that he or she is not acting as agent of any person, corporation or syndicate in making such entry, nor in collusion with any person, corporation or syn-

dicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself, or herself, and that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which he or she might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person, except himself, or herself, and upon filing such affidavit with the register or receiver, on payment of five dollars when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres, he or she shall thereupon be permitted to enter the amount of land specified."

Section 2291, as amended by the Act of March 3, 1877, Chap. 122, 14 Stat. L. 67:

"No certificate, however, shall be given, or patent issued therefore, until the expiration of five years from the date of such entry; and if at the expiration of such time or at any time within two years thereafter, the person making entry, or if he be dead, his widow, or in case of her death, his heirs or devisee, or in case of widow making entry, her heirs or devisee, in case of her death, proves by two credible witnesses, that he, she or they have resided upon or cultivated the same for the terms of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided for in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the Government of the United States, then, in such case, he, she or they, if at that time citizens of the United States,

shall be entitled to a patent, as in other cases provided by law."

Section 1, as amended by the Act of March 3, 1877, Chap. 122, 19 Stat. L. 403, is as follows:

"That the proof of residence, occupation or cultivation, the affidavit of non-alienation, and the oath of allegience, required to be made by Section twenty-two hundred and ninety-one of the Revised Statutes, may be made before the judge, or in his absence, before the clerk of any court of record in the county and State, or district and Territory, in which court of record of the county and State, or district and Territory, in which the lands are situated, and if the said lands are situated in any unorganized county, such proof may be made in a similar manner in any adjacent county in said State or Territory; and the proof, affidavit and oath, when so made and duly subscribed, shall have the same force and effect as if made before the register or receiver of the proper land district; and the same shall be transmitted by such judge, or the clerk of his court, to the register and the receiver, with fee and charges allowed by law to him; and the register and receiver shall be entitled to the same fees for examining and approving said testimony as are now allowed by law for taking the same."

Section 1, as amended by the Act of March 3, 1879, Chap. 192, 20 Stat. L. 472, is as follows:

"That before final proof shall be submitted by any person claiming to enter agricultural lands under the laws providing for re-emption or homestead entries, such person shall file with the register of the proper land office a notice of his or her intention to make such proof, stating therein the description of lands to be entered, and the names of the witnesses by whom the necessary facts will be established. Upon

the filing of such notice, the register shall publish a notice, that such application has been made, once a week for a period of thirty days, in a newspaper to be by him designated as published nearest to such land, and shall also post such notice in some conspicuous place in his office for the same period. Such notice shall contain the names of the witnesses as stated in the application. At the expiration of said period of thirty days, the claimant shall be entitled to make proof in the manner heretofore provided by law. The Secretary of the Interior shall make all necessary rules for giving effect to the foregoing provisions."

CONCLUSION

It will be observed from the pleading in this case that the only act ever done or performed by the respondent Alexander J. Dickson was to make and tender to the land office an application, which was rejected. It is true that he seeks to make proof of his occupation and cultivation in the court where he filed this suit. He also filed an affidavit as required. He didn't, however, make any act to comply with the Act of March 3, 1879, by publishing notice of his intention to prove up.

It seems to us that we cannot be wrong in our contention that the mere tendering an application, which was rejected, could be made the basis of a suit in equity to establish title to public lands of the United States.

Respectfully submitted,

O. C. WYBRANT,
CHAS. SWENDALL,
Woodward, Okla.,
CLAUDE NOWLIN,
S. A. HORTON,
Oklahoma City, Okla.,
Counsel for the Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 158.

SUSAN LOWE, PETITIONER,

vs.

ALEXANDER J. DICKSON, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

Petitioner's Answer to "Motion for a Rule on the Petitioner to Show Cause Why There Should Not be Furnished Additional Security under the Supersedeas Bonds Herein."

Susan Lowe, by her attorney, files the affidavit of more than seventy-five neighbors having personal acquaintance for more than five years with the respondent, Alexander J. Dickson, to the effect that his reputation in that community for truth and veracity

is bad. This, it is respectfully submitted, is a sufficient answer to the affidavit of said Alexander J. Dickson (Exhibit No. 2) upon which the above motion is largely based.

Petitioner also files the sworn and detailed statements of O. M. Kirkhart, George M. Merett, and George Heglin as to their respective assets and liabilities, showing net assets of about $4,500, $8,400, and $49,850, respectively. It is earnestly submitted that these affidavits answer sufficiently the other exhibits attached to said motion.

Accordingly it is prayed that the motion be denied.

Respectfully submitted,

SAMUEL HERRICK,
Attorney for Susan Lowe.

Service of copy hereof and of copies of all accompanying papers is acknowledged this 10th day of December, 1926, at Washington, D. C.

Attorney for Respondent.

APPENDIX.

Exhibit A.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

No. 158.

SUSAN LOWE, *Petitioner*,

vs.

ALEXANDER J. DICKSON, *Respondent*.

On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

Affidavits in Response to Motion for Rule for Additional Bonds in Supersedeas.

STATE OF OKLAHOMA,
Beaver County, ss:

F. C. McGuinn, W. H. Hedges, Nella Whisenhunt, R. K. Parker, G. A. Jones, O. O. Lemmons, J. H. Shephard, J. A. Hamilton, O. M. Kirkhart, Mrs. J. A. Hamilton, C. G. Simons, H. S. Mathers, W. E. Dodson, being first duly sworn, on his oath deposes and says that he is a resident and citizen of Gate, Beaver County, Oklahoma, and has resided in said vicinity for more than five years last past; that affiant is personally acquainted with Alexander J. Dickson, who resides in the vicinity of Gate, Oklahoma, and has been so acquainted during the above-mentioned time; that affiant is acquainted with the general reputation of the said

Alexander J. Dickson in this community and the community in which he has lived during said time for truth and veracity and knows that such reputation is bad. Affiant further says that he has no personal enmity or feeling against said Dickson, but that the facts above stated are what his neighbors usually say of him.

~~F. C. McGuinn~~	~~G. A. Jones~~
~~R. K. Parker~~	J. H. Shephard
~~O. O. Lemmons~~	O. M. Kirkhart
J. A. Hamilton	C. H. Simons
Mrs. J. A. Hamilton	W. E. Dodson
H. S. Mathers	~~Artie Dodson~~
W. H. Hedges	Nella Whisenhunt
W. D. Foresman	J. H. Bailey
Nell Miller	F. C. McGuinn
E. D. Morris	Bert Smith
Laura J. Davis	N. H. McLeod
Arta Mott	Lonnie Maphet
Sye Mott	Alma Pieratt
O. N. Taylor	S. S. Elliott
Artie Cronk	A. L. Kirkhart
Earl Kerns	C. E. Haynes
E. C. Arnett	John Craig
J. G. Correll	D. W. Buckner
J. H. Kirkpatrick	W. O. Rather
Nellie Kirkpatrick	Ada Kerns
O. O. Lemmons	Florence Cope
Ray Foresman	Mrs. Harry Mathers
B. Nylund, Editor Gate City News	Mrs. H. L. Jividen
J. R. King	Mrs. M. E. Reece
R. N. Wright	Urmal Reece
D. T. Whitaker	H. T. Harper
T. H. Kirkpatrick	Jacob Berends
J. H. Lemmons	O. M. Davis

Mrs. E. M. Wolf
T. E. Kirkhart
Clara E. Davis
Sam Berends
Sarah Despain
Rebeca Hedges
Mrs. R. L. Pearce
R. L. Pearce
Mrs. R. W. Hubbard
Otto Stanley
Alice Allen
F. M. Allen
Mamie E. Bowyer
J. F. Wriston
Geo. M. Merett
T. A. Williamson
C. E. Kirkhart
E. E. Sutton
Ad Cohlmin
R. Cuningham
Barbara Cuningham
Wm. Browning
E. L. Blakely
B. F. Despain
D. L. Allen
Bert H. Price
John Despain

STATE OF OKLAHOMA,
County of Beaver, ss:

Before me, the undersigned, a Notary Public in and for said county and state, on this 2nd and 3rd & 4th days of December, 1926, personally appeared F. C. McGuinn, Nell Miller, E. D. Morris, Laura Davis, Arta Mott, Sye Mott, O. N. Taylor, Artie Cronk, Earl Kerns, E. C. Arnett, J. G. Correll, J. H. Kirkpatrick, Nellie Kirkpatrick, J. H. Bailey, Bert Smith, N. H. McLeod, Lonnie Maphet, J. A. Hamilton, W. E. Dodson, Alma Pieratt, O. O. Lemons, Ray Foresman, B. Nylund (Ed. of Gate Valley News), J. R. King, R. N. Wright, D. T. Whitaker, S. S. Elliott, A. L. Kirkhart, C. E. Haynes, John Craig, D. W. Buckner, W. O. Rathers, Ada Kerns, Florence Cope, Mrs. Harry Mathers, Mrs. H. L. Jividen, Mrs. M. E. Reese, Urmal Reese, T. H. Kirkpatrick, H. T. Harper, J. H. Lemons, Mrs. E. M. Wolf, T. E. Kirkhart, Clara E. Davis, Sam Berends, Sarah Despain, Rebeca Hedges, Mrs. R. L. Pearce, R. L. Pearce, Mrs. R. W. Hubbard, Otto Stanley, Alice Allen, F. M.

Allen, Jacob Berends, O. M. Davis, Geo. M. Merett, T. A. Williamson, C. E. Kirkhart, E. E. Sutton, Ad Collmin, R. Cunningham, J. F. Wriston, Barbara Cunningham, Wm. Browning, E. L. Blakeley, B. F. Despain, D. L. Allen, Bert H. Price, John Despain, H. S. Mathers, Mrs. J. A. Hamilton, Nella Whisenhunt, C. H. Simons, J. H. Shepherd, O. M. Kirkhart, W. H. Hedges, W. D. Foresman and Mamie E. Bowyer, to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

My commission expires October 23, 1930.

[SEAL.] AUGUSTINE FORESEMAN,
Notary Public.

(3902)

FEDERAL RESERVE BANK OF KANSAS CITY—FORM NO. CD-4

EXHIBIT B.

STOCKMAN OR FARMER

FROM George Heglin ADDRESS Gate, Okla.

TO

FOR THE PURPOSE OF OBTAINING LOANS AND DISCOUNTING PAPER WITH YOU, AND OTHERWISE PROCURING CREDIT FROM TIME TO TIME, I FURNISH YOU WITH THE FOLLOWING STATEMENT AND INFORMATION, WHICH IS A TRUE AND CORRECT STATEMENT OF MY FINANCIAL CONDITION ON December 4- 1926 19

I AGREE TO AND WILL NOTIFY YOU IMMEDIATELY IN WRITING OF ANY MATERIALLY UNFAVORABLE CHANGE IN MY FINANCIAL CONDITION, AND IN THE ABSENCE OF SUCH NOTICE, OR OF A NEW AND FULL WRITTEN STATEMENT, THIS MAY BE CONSIDERED AS A CONTINUING STATEMENT AND SUBSTANTIALLY CORRECT; AND IT IS HEREBY EXPRESSLY AGREED THAT UPON APPLICATION FOR FURTHER CREDIT, THIS STATEMENT SHALL HAVE THE SAME FORCE AND EFFECT AS IF DELIVERED AS AN ORIGINAL STATEMENT OF MY FINANCIAL CONDITION AT THE TIME SUCH FURTHER CREDIT IS REQUESTED.

(FILL ALL BLANKS, WRITING "NO" OR "NONE" WHERE NECESSARY TO COMPLETE INFORMATION)

ASSETS

PERSONAL PROPERTY: NUMBER	THOUSANDS	HUNDREDS	CENTS
10 STEERS 1 YEAR OLD @ $ 25.00 PER HEAD	$	250.	00
STEERS 2 YEARS OLD @ $ PER HEAD			
STEERS 3 YEARS OLD @ $ PER HEAD			
STEERS 4& UP @ $ PER HEAD			
HEIFERS 1& AND 2& @ $ PER HEAD			
14 COWS @ $ 50.00 PER HEAD		700.	00
8 CALVES (10) @ $ 10.00 PER HEAD		80.	00
1 BULLS @ $ 70.00 PER HEAD		70.	00
60 HORSES @ $ 50.00 PER HEAD		3,000.	00
70 MULES @ $ 75.00 PER HEAD		5,250.	00
SHEEP @ $ PER HEAD			
160 HOGS @ $ 15.00 PER HEAD		2,400.	00

LIABILITIES

ENCUMBRANCE ON LIVE STOCK, AS FOLLOWS:	THOUSANDS	HUNDREDS	CENTS
TO	$		
DATED 19 DUE			
COVERING			
RATE: %			
~~Security State Bank,~~			
Rosston, Okla.	1,	069.	42
OTHER BORROWED MONEY: (ITEMIZE)			
ACCOUNTS PAYABLE			

TO _____

FOR THE PURPOSE OF OBTAINING LOANS AND DISCOUNTING PAPER WITH YOU, AND OTHERWISE PROCURING CREDIT FROM TIME TO TIME, I FURNISH YOU WITH THE FOLLOWING STATEMENT AND INFORMATION, WHICH IS A TRUE AND CORRECT STATEMENT OF MY FINANCIAL CONDITION ON December 4- 1926 19___

I AGREE TO AND WILL NOTIFY YOU IMMEDIATELY IN WRITING OF ANY MATERIALLY UNFAVORABLE CHANGE IN MY FINANCIAL CONDITION, AND IN THE ABSENCE OF SUCH NOTICE, OR OF A NEW AND FULL WRITTEN STATEMENT, THIS MAY BE CONSIDERED AS A CONTINUING STATEMENT AND SUBSTANTIALLY CORRECT; AND IT IS HEREBY EXPRESSLY AGREED THAT UPON APPLICATION FOR FURTHER CREDIT, THIS STATEMENT SHALL HAVE THE SAME FORCE AND EFFECT AS IF DELIVERED AS AN ORIGINAL STATEMENT OF MY FINANCIAL CONDITION AT THE TIME SUCH FURTHER CREDIT IS REQUESTED.

(FILL ALL BLANKS, WRITING "NO" OR "NONE" WHERE NECESSARY TO COMPLETE INFORMATION)

ASSETS

	THOUSANDS	HUNDREDS	CENTS
PERSONAL PROPERTY:			
NUMBER			
10 STEERS 1 YEAR OLD @ $ 25.00 PER HEAD	$	250.	00
____ STEERS 2 YEARS OLD @ $ ____ PER HEAD			
____ STEERS 3 YEARS OLD @ $ ____ PER HEAD			
____ STEERS 4& UP ____ @ $ ____ PER HEAD			
____ HEIFERS 1& AND 2& @ $ ____ PER HEAD			
14 COWS ____ @ $ 50.00 PER HEAD		700.	00
8 CALVES (1& ____) @ $ 10.00 PER HEAD		80.	00
1 BULLS ____ @ $ 70.00 PER HEAD		70.	00
60 HORSES ____ @ $ 50.00 PER HEAD		3,000.	00
70 MULES ____ @ $ 75.00 PER HEAD		5,250.	00
____ SHEEP ____ @ $ ____ PER HEAD			
160 HOGS ____ @ $ 15.00 PER HEAD		2,400.	00
CASH IN BANK 600- acres wheat $3.00 A		1,800.	00
BILLS (NOTES) RECEIVABLE (ALL GOOD)		2,000.	00
GRAIN AND FEED ON HAND AS FOLLOWS: (ITEMIZE)			
600 bushels grain in bin		300.	00
100 tons feed		500.	00
Farm & Tractor Equipement		3,500.	00
GROWING CROPS. ~~1926~~ ACRES OF ____			
ALL OTHER PERSONAL PROPERTY AND OF WHAT COMPOSED			
REAL ESTATE:			
HOMESTEAD ____ $ ____			
LESS EXEMPTION ____ $ ____			
OTHER REAL ESTATE:			
1080 ACRES IN Beaver COUNTY @ $ ____		30,000.	00
____ ACRES IN ____ COUNTY @ $ ____			
TOTAL ASSETS:	$	49,850.	00

LIABILITIES

	THOUSANDS	HUNDREDS	CENTS
ENCUMBRANCE ON LIVE STOCK, AS FOLLOWS:			
TO ____	$		
DATED ____ 19___ DUE ____			
COVERING ____			
RATE: ____ %			
~~Security State Bank,~~ Rosston, Okla.		1,069.	42
OTHER BORROWED MONEY: (ITEMIZE)			
ACCOUNTS PAYABLE ____			
AMOUNT DUE RELATIVES: (ITEMIZE)			
NOTES ENDORSED FOR FRIENDS ____			
ENCUMBRANCE ON REAL ESTATE ____		12,000.	00
ALL OTHER DEBTS: (ITEMIZE)			
TOTAL LIABILITIES ____	$	12,069.	42
NET WORTH ____	$	37,780.	58
TOTAL ____	$	49,850.	00

(FILL OUT ALL BLANKS AND SIGN ON OPPOSITE PAGE)
(OVER)

REAL ESTATE

DESCRIPTION	IMPROVEMENTS	VALUE		MORTGAGES	EQUITY
		ASSESSED	CASH		

IN WHOSE NAME IS TITLE TO ABOVE REAL ESTATE HELD? George Heglin

IS REAL ESTATE HELD IN FEE SIMPLE OR LEASEHOLD? Fee Simple

I HAVE UNDER LEASE 800 ACRES OF Grass & Farm LAND

THE RENTAL PRICE BEING $ crop & Cash WHICH HAS BEEN PAID TO _____ 19____

REMARKS:

HAVE YOU ANY PARTNERS IN YOUR BUSINESS? no IF SO, STATE PARTICULARS _____

I REFER TO THE FOLLOWING PEOPLE WITH WHOM I HAVE HAD BUSINESS RELATIONS AND WHO ARE ACQUAINTED WITH MY PERSONAL AND FINANCIAL CONDITION

LIFE INSURANCE $ 3,000.00 PAYABLE TO Estate

BUILDINGS INSURED FOR $ 6,000.00 GRAIN INSURED FOR $ _____ CATTLE AND HOGS INSURED FOR $ _____

POSTOFFICE ADDRESS Gate (TOWN) Beaver (COUNTY) Oklahoma (STATE)

I HAVE RESIDED AT ABOVE LOCATION 18 YEARS _____ MONTHS. FORMERLY RESIDED _____

THERE ARE NO JUDGMENTS OR SUITS PENDING AGAINST ME AT THIS TIME. AGE 45 YEARS. MARRIED OR SINGLE Married

ABOVE STATEMENT, BOTH WRITTEN AND PRINTED, HAS BEEN READ BY me BEFORE SIGNING, AND IS CORRECT.

DATED AT Rosston, Okla. THIS 4th DAY OF December 1926 19____

WITNESS:

_____ (SIGNED) George Heglin

_____

SUBSCRIBED AND SWORN TO BEFORE ME THIS 4th. DAY OF December 1926 19____

E L Paul
(NOTARY PUBLIC IN AND FOR)

[SEAL]

MY COMMISSION EXPIRES Oct. 14- 1929 19____

STATEMENTS SUBMITTED TO FEDERAL RESERVE BANK MUST EITHER BE SIGNED ORIGINALS OR CERTIFIED COPIES. IF COPIES ARE FURNISHED, FOLLOWING CERTIFICATE MUST BE OFFICIALLY SIGNED BY MEMBER BANK.

WE HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF A SIGNED FINANCIAL STATEMENT OF THE ABOVE MENTIONED INDIVIDUAL, FIRM OR CORPORATION NOW ON FILE IN THIS BANK.

(NAME OF MEMBER BANK) _____

(OFFICIAL SIGNATURE) _____ (TITLE)

STATEMENTS CERTIFIED BY CHARTERED PUBLIC ACCOUNTANTS MAY, IN THE DISCRETION OF THE EXECUTIVE COMMITTEE OF THE FEDERAL RESERVE BANK, BE ACCEPTED

(OVER)

EXHIBIT C.

FROM O M Kirkhart ADDRESS Lodi Ark

TO

For the purpose of obtaining loans and discounting paper with you, and otherwise procuring credit from time to time, I furnish you with the following statement and information. which is a true and correct statement of my financial condition on 12-4 19 26

I agree to and will notify you immediately in writing of any materially unfavorable change in my financial condition, and in the absence of such notice, or of a new and full written statement, this may be considered as a continuing statement and substantially correct; and it is hereby expressly agreed that upon application for further credit, this statement shall have the same force and effect as if delivered as an original statement of my financial condition at the time such further credit is requested.

(Fill all blanks, writing "No" or "None" where necessary to complete information.)

ASSETS

	Thousands	Hundreds	Cents
Personal Property: Number			
..... Steers 1 year old @ $..... per head	$		
..... Steers 2 years old @ $..... per head			
..... Steers 3 years old @ $..... per head			
..... Steers 4s up ..... @ $..... per head			
..... Heifers 1s and 2s @ $..... per head			
..... Cows ..... @ $..... per head			
..... Calves (19.....) @ $..... per head			
..... Bulls ..... @ $..... per head			
..... Horses ..... @ $..... per head			
..... Mules ..... @ $..... per head			
..... Sheep ..... @ $..... per head			
..... Hogs ..... @ $..... per head			
Cash in ..... Bank			
Bills (notes) receivable (all good)	2	000	00
See by RC Mtg			
Feed on hand as follows: (Itemized)			
All other personal property and of what comp.			
Real Estate:			
Less exemption $			
Homestead Town Property	2	500	00
..... Acres in ..... County @ $			
..... Acres in ..... County @ $			
Total Assets:	$ 4	500	00

LIABILITIES

	Thousands	Hundreds	Cents
Encumbrance on live stock as follows:			
To	$		
Dated ..... 19 Due			
Covering			
Rate: ..... %			
Other borrowed money: (Itemize)			
Accounts payable			
Amount due relatives: (Itemize)			
Notes endorsed for friends			
Encumbrance on real estate	1	000	00
All other debts: (Itemize)			
Total Liabilities	$		
Net Worth	$ 3	500	00
Total	$ 4	500	00

(Fill out all blanks and sign on opposite page)

(OVER)

REAL ESTATE

DESCRIPTION	IMPROVEMENTS	VALUE ASSESSED	VALUE CASH	MORTGAGES	EQUITY
Residence Property Gate Okla				1000	1500 00

In Whose Name is Title to above real estate held? O M Kirkhart

Is real estate held in Fee Simple or Leasehold? Fee Simple

I have under lease ..... acres of ..... land .....

the rental price being $..... which has been paid to ..... 19.....

Remarks:

Have you any partners in your business? No If so, state particulars .....

I refer to the following people with whom I have had business relations and who are acquainted with my personal and financial condition

There are no judgments or suits pending against me at this time.

Age 54 years. Married or single Married

Postoffice address Gate Okla

I have resided at above location 15 years ..... months. Formerly resided .....

Above statement, both written and printed, has been read by ..... before signing, and is correct.

Dated at Gate Okla this 4 day of Dec 19 26

Witness: (Signed) O M Kirkhart

Subscribed and sworn to before me this 4 day of Dec. 192 6

E D Haworth

(Seal) My commission expires 3-16 1927

Statements submitted to Federal Reserve Bank must either be signed originals or certified copies. If copies are furnished, following certificate must be officially signed by member bank.

We hereby certify that the foregoing is a true and correct copy of a signed financial statement of the above individual, firm or corporation now on file in this bank.

Name of member bank) .....

(Official Signature .....

Statements certified by chartered public accountants may, in the discretion of the executive committee of The Federal Reserve Bank, be accepted.

EXHIBIT D.

FROM George M. Merett ADDRESS Gate Okla

TO

For the purpose of obtaining loans and discounting paper with you, and otherwise procuring credit from time to time, I furnish you with the following statement and information. which is a true and correct statement of my financial condition on 12-3 1926
I agree to and will notify you immediately in writing of any materially unfavorable change in my financial condition, and in the absence of such notice, or of a new and full written statement, this may be considered as a continuing statement and substantially correct; and it is hereby expressly agreed that upon application for further credit, this statement shall have the same force and effect as if delivered as an original statement of my financial condition at the time such further credit is requested.

(Fill all blanks, writing "No" or "None" where necessary to complete information.)

ASSETS

	Thousands	Hundreds	Cents
Personal Property: Number			
..... Steers 1 year old @ $..... per head	$		
..... Steers 2 years old @ $..... per head			
..... Steers 3 years old. @ $..... per head			
..... Steers 4s up ..... @ $..... per head			
..... Heifers 1s and 2s @ $..... per head			
..... Cows ..... @ $..... per head			
..... Calves (19.....) @ $..... per head			
..... Bulls ..... @ $..... per head			
..... Horses ..... @ $..... per head			
..... Mules ..... @ $..... per head			
..... Sheep ..... @ $..... per head			
..... Hogs ..... @ $..... per head			
Cash in ..... Bank			
Bills (notes) receivable (all good)			
Feed on hand as follows: (Itemized)			
All other personal property and of what comp.			
Real Estate:			
Less exemption 160 Farm	6	400	00
Homestead $ Residence	2	000	00
..... Acres in ..... County @ $			
..... Acres in ..... County @ $			
Total Assets:	$ 8	400	00

LIABILITIES

	Thousands	Hundreds	Cents
Encumbrance on live stock as follows:			
To	$		
Dated ..... 19 Due			
Covering			
Rate: ..... %			
Other borrowed money: (Itemize)			
Accounts payable			
Amount due relatives: (Itemize)			
Notes endorsed for friends			
Encumbrance on real estate	1	500	00
All other debits: (Itemize)			
Total Liabilities	$ 1	500	00
Net Worth	$ 6	900	00
Total	$ 8	400	00

(Fill out all blanks and sign on opposite page)
(OVER)

REAL ESTATE

DESCRIPTION	IMPROVEMENTS	VALUE ASSESSED	VALUE CASH	MORTGAGES	EQUITY
SW¼ Sec 28-5-28	None			1500.00	4900

In Whose Name is Title to above real estate held? George M. Merritt

Is real estate held in Fee Simple or Leasehold? Yes

I have under lease None acres of ..... land .....

the rental price being $..... which has been paid to ..... 19....

Remarks:

Have you any partners in your business? No If so, state particulars .....

I refer to the following people with whom I have had business relations and who are acquainted with my personal and financial condition

There are no judgments or suits pending against me at this time.

Age 52 years. Married or single Married

Postoffice address Gate Okla

I have resided at above location 15 years ..... months. Formerly resided .....

Above statement, both written and printed, has been read by me before signing, and is correct.

Dated at Gate Okla this 3 day of Dec 1926

Witness: (Signed) Geo. M. Merritt

Subscribed and sworn to before me this 3 day of Dec 1926

E. L. Ellsworth

(Seal) My commission expires 3-16 1927

Statements submitted to Federal Reserve Bank must either be signed originals or certified copies. If copies are furnished, following certificate must be officially signed by member bank.

We hereby certify that the foregoing is a true and correct copy of a signed financial statement of the above individual, firm or corporation now on file in this bank.

Name of member bank).....

(Official Signature.....

Statements certified by chartered public accountants may, in the discretion of the executive committee of The Federal Reserve Bank, be accepted.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 158.

SUSAN LOWE, PETITIONER,

vs.

ALEXANDER J. DICKSON, RESPONDENT.

ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

SUPPLEMENTAL BRIEF FOR PETITIONER.

SAMUEL HERRICK,
Attorney for Petitioner.

S. A. HORTON,
O. C. WYBRANT,
CHARLES SWENDALL,
CLAUDE NOWLIN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 158.

SUSAN LOWE, PETITIONER,

vs.

ALEXANDER J. DICKSON, RESPONDENT.

ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

SUPPLEMENTAL BRIEF FOR PETITIONER.

I.

Dickson's Entry of Disputed Land Not Invalid Upon Its Face, But Considered Valid by Local Land Office and so Allowed.

Respondent has repeatedly argued here, also in the lower courts, that his entry of the land in controversy, made in the year 1902, showed plainly upon its face

that he was disqualified to make a homestead entry; and this contention has apparently been accepted at its full face value by the lower courts.

The facts are far otherwise. What Dickson actually stated in his homestead affidavit (R. 10) was: "That I have not heretofore made an entry under the homestead laws, except I filed W. ½ N. W. ¼ & S. W. ¼ Sec. 15, being three miles from west and eight miles from the north line of Woodward County, *and paid out on it about three years ago*" (italics are ours). This statement carried the impression to the minds of the local officers (though whether so intended or not we cannot say) that he had commuted his homestead entry instead of making final proof upon it. The local officers thereupon verified this by examining their record of cash sales, which seemed to confirm the impression, and they hence allowed the entry, but subsequently ascertained that, while Dickson paid the legal price for the land, he had in reality submitted a five-year proof (R. 3, 4).

Acting under this misapprehension, caused by Dickson's own statement, the local officers were justified in allowing the entry, because if the previous entry had been commuted he would have been qualified to make another under and by virtue of Section 2 of the Act of June 5, 1900 (31 Stat., 267, c. 716), which reads in full as follows:

> "That any person who has heretofore made entry under the homestead laws and commuted same under provisions of section twenty-three hundred and one of the Revised Statutes of the United States and the amendments thereto shall

> be entitled to the benefits of the homestead laws, as though such former entry had not been made, except that commutation under the provisions of section twenty-three hundred and one of the Revised Statutes shall not be allowed of an entry made under this section of this Act."

It follows from this that the Dickson entry was not "invalid on its face," but was apparently legal and allowable under the said Act of 1900. Dickson's own language misled the local land officers and would be apt to mislead any administrative officer. Far from showing upon its face that he had exhausted his rights under the homestead law, it showed, or indicated, that he had secured title to his previous entry under the commutation law and was for that reason entitled to enter the land now in controversy.

This fact has not been clearly set forth heretofore in this case and we therefore emphasize it now. It shatters completely the case so skillfully built up by Dickson's counsel upon the theory that his 1902 entry was "invalid on its face" and he was hence entitled to another entry of the land in 1906, upon filing application therefor during the pendency of the Lowe contest against his entry of record.

II.

The Land Entry in Question was Not Void, But Merely Voidable, and was Validated by Legislation Passed Shortly Afterward.

Less than three months after Dickson's entry was allowed, namely, on May 22, 1902, Congress passed an

Act (32 Stat., 203, c. 821, Sec. 2) allowing second homestead entries to those who had prior to the passage of the Act of May 17, 1900 (31 Stat., 179, c. 479), paid the price provided by the law opening certain Indian lands to settlement. This Act clearly validated the entry of Dickson, because he was fully within its terms and had his entry been made on May 23d instead of March 6th, 1902, there could have been no possible question about it. Both the local and the General Land offices, as well as the Secretary of the Interior, regarded it at all times as so validated. It is true that they might have canceled the entry and compelled Dickson to file another application subsequent to the passage of the Act of May 22, 1902, but such a course of procedure would have been cumbersome and wholly contrary to the practice and custom of the Land Department, which has been in all such instances to permit an erroneously allowed entry to remain intact until legislation pending in Congress had become finally enacted, and then regard the original defect in the entry as cured by such legislation. We submit that such general practice, which was followed in this particular case, is reasonable and sensible, wherefore it should be upheld by the Court under the general doctrine that a custom of the Department followed for many years will not be set aside, unless there be some compelling reason.

Counsel for petitioner has contended that the said Act of 1902 was not curative legislation; but we submit that, as it was remedial in purpose and conferred a benefit, it was properly administered by the Depart-

ment to cover entries previously allowed erroneously; and since such practice did not curtail or affect the rights of any other individual it should be sustained. Certainly the cases cited against the retroactive operation of a statute—and which are mainly criminal or revenue cases—have no application here, where the Government was extending a benefit to one of its citizens without any adverse right whatsoever being involved.

That the Interior Department follows this practice appears from its decisions in John J. Stewart (9 L. D., 543) and George W. Blackwell (11 L. D., 384), both holding that "*The right to make a second homestead entry conferred by the Act of March 2, 1889, validates such an entry made prior thereto though not authorized by the law when made.* An additional homestead entry made prior to the passage of said Act may, under the provisions of Section 6 thereof, be permitted to stand though unauthorized by law when made." And in the later case of Smith *et al. vs.* Taylor (23 L. D., 440) the Department, while finding the entry to be irregularly allowed, held that should it be canceled it would be without prejudice to the party's right to make another entry for the same tract, wherefore "*cancellation under these conditions would be a vain act. The entry will be allowed to stand.*" (Italics ours.)

The Stewart decision was cited with approval in Talmadge *vs.* Cruikshank (15 L. D., 140) and Frank L. Morgan (37 L. D., 6). It appears to represent correctly the practice of the Department permitting to

stand intact any entry which was originally allowed without authority of law, but which has been validated by a subsequent Act of Congress.

In considering another practice by the Interior Department in relation to the allowance of land entries, this honorable Court thus ruled (McLaren *vs.* Fleischer, 256 U. S., 477, 480):

> "In the practical administration of the act the officers of the Land Department have adopted and given effect to the latter view. They adopted it before the present controversy arose or was thought of; and, except for a departure soon reconsidered and corrected, they have adhered to and followed it ever since. Many outstanding titles are based upon it and much can be said in support of it. If not the only reasonable construction of the Act, it is at least an admissible one. It therefore comes within the rule that the practical construction given to an Act of Congress fairly susceptible of different constructions, by those charged with the duty of executing it, is entitled to great respect, and, if acted upon for a number of years, will not be disturbed except for cogent reasons," citing Brown *vs.* United States, 113 U. S., 568, 571; Webster *vs.* Luther, 163 U. S., 331, 342; United States *vs.* Hammers, 221 U. S., 220, 228; Logan *vs.* Davis, 233 U. S., 613, 627; Le Roque *vs.* United States, 239 U. S., 62, 64.

III.

Under a Settled Practice of the Interior Department Dickson's Entry of Record Segregated Land Involved, and Prevented Acquisition of Rights Under His Later Application.

The many decisions rendered in this case by the General Land Office and the Department to the effect that Dickson's 1906 application could not be allowed, and that it conferred no right upon him, were in harmony with the general doctrine established by the Department prior to that time and followed consistently ever since.

True it is that prior to June 14, 1899, there had been some conflict of opinion in the Department on the question of filing applications for land already included in an entry of record, but on that date the Department held, in Stewart *vs.* Peterson (28 L. D., 515), that "no rights, either inchoate or otherwise, are acquired to lands involved in a pending contest, by an application to enter filed before the rights of the entryman have been finally determined," and directed the preparation of a circular letter to the various local land officers to carry this ruling into effect. Such circular was promulgated on July 14, 1899 (29 L. D., 29), and it has since been in full force and effect. This was nearly three years prior to the allowance of Dickson's entry and seven years before he presented the homestead application under which he now claims, hence the Stewart-Peterson doctrine fully covered his case and

prevented the Department from allowing his 1906 application and from recognizing the acquisition of any right thereunder.

This honorable Court had occasion to refer to and follow the doctrine of Stewart *vs.* Peterson in its decision in Holt *vs.* Murphy (207 U. S., 407, 414, 415); and, in the language of Mr. Justice Brewer in that case—

> "By this rule, which was in force at the time the patent was issued, the appellant took no rights, preferential or otherwise, by the declaratory statement filed in March, 1890. Such a rule, when established in the Land Department, will not be overthrown or ignored by the courts, unless they are clearly convinced that it is wrong. So far from this being true of this rule, we are of opinion that to enforce it will tend to prevent confusion and conflict of claims."

In passing, it should be noted that the three Interior Department decisions relied upon by Dickson and cited on pages 15 and 16 of his brief were all rendered many years prior to the establishment of the Stewart-Peterson ruling, and hence they constituted no precedent for the Department to follow in this case. Moreover, they all involved entries allowed for lands not subject thereto and are, therefore, inapplicable here, where the land was clearly subject to appropriation when the Dickson entry was made in 1902.

In petitioner's brief, heretofore filed, it has been shown that the uniform practice of the Department in the cases of entries erroneously allowed to minors, and to aliens, etc., has been to permit them to stand of rec-

ord providing the disqualification be removed before the interposition of any adverse right, and that this practice was followed or at least recognized by this Court, except in one particular instance, namely, Prosser *vs.* Finn (208 U. S., 67). We have no intention to elaborate on that portion of the argument, except to invite attention to the fact that the last-mentioned case was based upon the organic law of the Land Department enacted when the General Land Office was created in 1812, re-enacted when that office was reorganized in 1836, carried into the U. S. Revised Statutes as Section 452, and continued ever since as part of the basic law of the Interior Department in relation to the disposition of the public lands. Surely it can have no application to a case like this, where the law was changed within three months after the original entry was made, and over two years before the contestant's rights intervened, also more than four years before filing of the application upon which respondent relies. And it is significant that Prosser *vs.* Finn was decided almost contemporaneously with Holt *vs.* Murphy (*supra*), and made no reference thereto.

This whole question was ably discussed and settled by the decision of this Court in Hastings and Dakota Railroad Company *vs.* Whitney (132 U. S., 357-366). Therein Mr. Justice Lamar, who had previously been a distinguished Secretary of the Interior, thus laid down the law:

> "Under the homestead law three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make

an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. *When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made—the land is entered.* If either one of these integral parts of an entry is defective, that is, if the affidavit be insufficient in its showing, or if the application itself is informal, or if the payment is not made in actual cash, the register and receiver are justified in rejecting the application. But if, notwithstanding these defects, the application is allowed by the land officers, and a certificate of entry is delivered to the applicant, and the entry is made of record, such entry may be afterwards canceled on account of these defects by the Commissioner, or on appeal by the Secretary of the Interior; or, as is often the practice, the entry may be suspended, a hearing ordered, and the party notified to show by supplemental proof a full compliance with the requirements of the Department; and on failure to do so the entry may then be canceled. *But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants.*" (Italics are ours.)

IV.

The Mere Tender of a Homestead Application and Appeal from Its Rejection Not Sufficient to Entitle Applicant to Bring an Action to Establish a Resulting Trust.

In our previous brief (pages 32-41, inclusive) it was argued at length that Dickson, by merely tendering his application of July 2, 1906, and appealing from its rejection, did not bring himself within the rule that one seeking to establish a resulting trust to a tract of former public land must show complete title in himself and not merely cast doubt upon the title of another. In the language of this Court (Fisher *vs.* Rule, 248 U. S., 314, 318):

> "It is a familiar rule that to succeed in such a suit the plaintiff 'must show a better right to the land than the patentee, such as in law should have been respected by the officers of the Land Department, and, being respected, would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent. Sparks *v.* Pierce, 115 U. S. 408, 413; St. Louis Smelting & Ref. Co. *v.* Kemp, 104 U. S. 636, 647; Bohall *v.* Dilla, 114 U. S. 47, 50; Lee *v.* Johnson, 116 U. S. 48, 50; Duluth & I. R. R. Co. *v.* Roy, 173 U. S. 587, 590; Johnson *v.* Riddle, 240 U. S. 467, 481; Anicker *v.* Gunsburg, 246 U. S. 110, 117."

In attempting to escape from this long-settled rule of the Federal courts, respondent has cited several

decisions, but none of them is applicable here. Thus in Duluth & I. R. R. Co. *vs.* Roy, 173 U. S., 587, the patent involved was issued by inadvertence and mistake, rather than designedly and after a full consideration of all conflicting claims, as in the present case; furthermore, the case was tried by the court and full findings of facts made, including the finding that defendant made settlement in good faith, established residence, and ever since resided upon, improved, and cultivated the land. The situation here is utterly different.

Ard *vs.* Brandon (156 U. S., 537) was tried upon admissions of record that defendant had resided upon the land with his family from 1866 to 1872, and that he then applied to make final proof. Moreover, it was not a suit to establish a trust, but a mere action for the recovery of possession. In Svor *vs.* Morris (227 U. S., 524), the evidence established defendant's settlement, continuous residence, occupation, cultivation of 100 acres, and improvements exceeding $2,000 in value (page 526), and the court held "that in point of residence, improvements, and cultivation, the defendant fully complied with the homestead law, is not questioned" (page 528). And finally, Nelson *vs.* Northern Pacific Railway Co. (188 U. S., 108), was tried upon a stipulation of facts, which included the admission that Nelson had resided upon the land continuously from 1881 to the time of filing the suit.

It is clear that none of these cases is an exception to the general rule, which we have above quoted, and

accordingly none is authority for the refusal by the Supreme Court of Oklahoma to apply that rule to the facts of the present case. Here the various tribunals of the Interior Department found repeatedly that Dickson had never settled upon the land in good faith, had never resided thereon or made it his home, had never cultivated and improved it, as required by law; and, though he was allowed a new trial, the result of it was merely to make the findings against him stronger (R., 27, 29, 32).

Dickson never attempted to submit final proof on his 1906 application, nor to supply the evidence of two credible witnesses, as well as his own, nor to give notice of his intention to make such proof and enable the adverse party to cross-examine him and his witnesses. Instead, the only possible step he took was to file, in the Probate Court, an affidavit (R., 38) purporting to be a final affidavit—but which surely could not take the place of the sworn statements of himself and two credible witnesses submitted before the local land office under the forms and with the sanction required by the homestead statutes (which statutes are quoted in full on pages 37-40 of our previous brief).

It is true that in his second amended and supplemental petition, filed July 31, 1919 (R., 1), he claims that he lived upon, improved, and cultivated the land subsequent to July, 1906, but this is denied by the amended answer of Lowe (R., 34), and no proof was submitted in support of it. Even if such proof had been made, it would not take the place of the final

proof required by law to be made before the Interior Department and of the sufficiency of which the Interior Department is the sole judge.

Furthermore, that no credit can be given Dickson's uncorroborated averment in the amended petition as to his residence on the land subsequent to 1906 is demonstrated by the fact of his swearing in his affidavit of that date (R., 12, 13) "that this affiant is now and for several years last past has been living continuously upon said tract of land and has placed valuable and lasting improvements thereon"—the exact opposite of which has been found by the local land office, the General Land Office, and the Secretary of the Interior after the hearing held in May, 1905, and after the rehearing held in May and June, 1909. And, as a further indication of the credit which must be given Dickson's own affidavit, we refer to the five character witnesses introduced at the first hearing (R., 18); also to the affidavits of 75 of his neighbors as to his reputation for truth and veracity in that community, which affidavits were filed recently in this Court in response to Dickson's motion for additional security.

Even without this, however, the fact remains that no final proof was ever submitted by Dickson, nor any attempt to that end made, nor any showing as to his alleged residence, improvements, and cultivation, except his uncorroborated affidavit filed in the lower court. The Interior Department, the sole judge of the existence and sufficiency of such facts, has been required by the State Courts' decisions to accept as embodying the truth Dickson's sole affidavit, though

contrary to all the facts found by the Department, after trial and new trial, in accordance with the laws of evidence. Further comment on the effect and incorrectness of the decisions below is wholly unnecessary.

V.

Party Seeking Equitable Jurisdiction of Court is Precluded from Alleging Nullity and Invalidity of Public Land Entry Deliberately Made by Him and Under Which He Accepted Benefits for Many Years.

Within a few days after Dickson made his entry of the land in dispute, to wit, March 6, 1902, he was notified by the local land office that his entry was erroneously allowed; that the General Land Office would doubtless hold it for cancellation on that account, and that if he desired he might relinquish the entry and secure return of the fees and commissions paid thereon, *but he took no action whatever under said notice* (R., 4). The entry was regularly reported to the General Land Office, was posted there on the tract books, no action being taken against it because of its irregular allowance, but in every way (except for the notice above mentioned) it was treated as a properly allowed entry of public land, and upon passage of the Act of Congress of May 22, 1902, it so became.

For more than four years after its allowance Dickson accepted the benefits of this entry, including the sole and undisputed right to possession of the land. During this time, a first-contest affidavit was filed by

Lowe, hearing had upon it, and decision rendered in Dickson's favor, all prior to the second contest, begun January 28, 1905 (R., 16). Thereupon Lowe's second contest was begun, went to hearing, and was decided against Dickson, namely, on June 20, 1906 (R., 15).

It was not until after such hearing and such decision against him, namely, on June 27, 1906, that Dickson employed attorneys to investigate the condition of his homestead entry, as he himself alleges in his homestead affidavit of July 2, 1906 (R., 12). And while he then maintained that his entry was invalid and later took an appeal from its rejection—though it is doubtful whether this was filed within five months instead of the 30 days required by the Interior Department's rules of practice (R., 15)—he did not make this contention to the exclusion of his claims as to the sufficiency of his residence, etc., but prosecuted both phases of his case together, and on appealing to the Secretary of the Interior he made the further contention that the local office's letter of March 11, 1902, "operated as a suspension of the entry and excused him from residence on the land" (R., 22).

Upon the rejection of his 1906 application being affirmed by both the General Land Office and the Secretary, he appears to have dropped that contention and instead applied for a new trial of the facts as to his residence under the 1902 entry. This was granted him and after the second hearing he apparently made no contention as to the alleged invalidity of his 1902 entry, but instead defended that entry against the charges made by Lowe, so far as can be judged from

the decisions rendered thereon. Not until the case had been finally adjudicated against him, his entry canceled, and Dickson had made entry, do we find him bringing the contention against the Lowe entry that his own 1902 appropriation of the land was "null and void" (R., 40, 41, 42).

It follows that for more than four years after making his entry in 1902 respondent accepted all the benefits of it without any question whatsoever, and that his first claim about its "invalidity" was made so soon after the decision against him upon Lowe's contest as to lead inevitably to the belief it was the result of that decision. Then for four more years he continued to defend against the Lowe contest, claiming that he had fully complied with the law under his homestead entry, submitting testimony thereon, also securing rehearing, etc., and thus for eight years demanding and securing all the possible benefits of that entry, though during a short period of that time claiming its invalidity for the evident purpose of strengthening his case on the merits. Not until he had finally and completely lost out before the Interior Department, after repeated hearings, appeals, and motions, did he elect to relinquish all claim under his 1902 entry and maintain that that entry was "null and void from its very inception."

We earnestly submit that he is precluded from setting up this claim in a court of equity, where he is required to come "with clean hands." He should not be allowed during so many years to claim under the entry and secure all the benefits due under the homestead statutes only to disclaim it later when it suited

his purposes and urge that not only his own entry, but all proceedings against it, were invalid *ab initio*. In the language of the Secretary of the Interior in this case (R., 22), "he could not assert the entry to be valid and at the same time regard it as void. As he asserted it to be good, and the law permitted it, he was bound to comply with the law of that entry."

Where one having the right to accept or reject a transaction takes and retains benefits thereunder, he becomes bound by the transaction and cannot avoid its benefits and effect by taking a position inconsistent therewith. Thus it has been repeatedly held that a person by the acceptance of benefits may be stopped from questioning the existence, validity, and effect of a contract (Cyc., vol. 16, title Estoppel, pages 787 *et seq.*). That an entry of public land is a contract between the entryman and the Government is too well settled to need citation of authorities. The court below failed to apply this well-known doctrine, probably because of its mistaken assumption (R.,52) that "early in the contest proceeding, plaintiff was asserting his right under his attempted entry of July 2, 1906, and asserting that his entry of March, 1902, was void," which, as above shown, is contrary to the record facts. Had this action been brought in a court of law, Dickson would have been estopped from setting up the alleged invalidity of an entry whose benefits he had claimed for so many years, and we respectfully urge that in a court of equity and on application for an extraordinary equitable remedy, namely, the setting aside of a land patent issued by the United States

Government, the reasons against his being permitted such contention are even stronger.

Conclusion.

We maintain, with all due respect, that the opinion and judgment of the Supreme Court of Oklahoma are contrary, not only to the practice and decisions of the Interior Department rendered during a long period of years, but also to many decisions of this honorable Court. Accordingly, we pray that that judgment be reversed. All of which is

Respectfully submitted,

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BEFORE THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. [redacted] 158

SEWARD K. LOWE, AND SUSAN LOWE, *Petitioners,*

vs.

ALEXANDER J. DICKSON, *Respondent.*

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

ANSWER OF RESPONDENT TO THE PETITION FOR WRIT OF CERTIORARI.

PATRICK H. LOUGHRAN,
Washington, D. C.,
Attorney For Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BEFORE THE

Supreme Court of the United States

OCTOBER TERM, 1925.

SEWARD K. LOWE, AND SUSAN LOWE, *Petitioners,*

v.

ALEXANDER J. DICKSON, *Respondent.*

No. 580.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

ANSWER OF RESPONDENT TO THE PETITION

Alexander J. Dickson, by his attorney, in answer to the petition for writ of certiorari herein, respectfully shows:

That the clerk presented the petition on October 5, 1925. That the record was not printed at the time (October 22, 1925) when this answer to the petition was drafted. Nor was the record as filed in the clerk's office accessible to respondent's counsel at that time.

The Matter of Law on Which the Petitioner Seeks the Opinion of This Court.

The dominant question in the case—the only question which the petitioners seek to have this court consider—is an unmixed question of law, to wit, did the act of Congress of May 22, 1902, Chap. 821, 32 Stat. 203, confirm and validate a concededly void homestead entry which a Register and Receiver of a local United States Land Office in Oklahoma inadvertently and erroneously permitted to be made on March 3, 1902, under an application for entry which contained in itself all the facts essential to proof of the invalidity of any entry allowed thereunder. The District Court of Beaver County, Oklahoma, and that State's Supreme Court were of the same mind with respect to the aforesaid question of law, those two courts deciding that the entry was void on its face and that said statute was not curative legislation and, therefore, did not validate such entry. The petitioners contend that the said statute was validating or curative legislation and, therefore, that the two courts below were guilty of error prejudicial to the rights of the petitioners.

THE MATERIAL FACTS IN THE CASE

The facts material here are these:

March 3, 1902, the respondent filed in the local land office an application for second homestead entry which fully described a homestead entry of 160 acres theretofore made by him and under which a patent had issued to him. Having already exercised and exhausted his right under the homestead laws, and having in his application for second entry expressly shown that he had done so, the respondent was wholly disqualified to make a second homestead entry. Revised Statutes, Sec. 2298, reads as follows:

> "No person shall be permitted to acquire title to more than one quarter section under the provisions of this chapter."

But notwithstanding the law's express prohibition of a second entry, respondent's said application for such entry (an application containing in itself proof of his disqualification), was erroneously entertained when it should have been rejected, and a homestead entry of 160 acres thereunder was inadvertently permitted on March 3, 1902. (P. 3 of petition.)

March 11, 1902, (p. 3 of the petition) the respondent was notified by the Register and Receiver "that the Commissioner (meaning the Commissioner of the General Land Office) will doubtless hold that the H. E. No. 11185 for cancellation and that he (the respondent) has a right to relinquish and make application for the return of his fees and commissions."

Seemingly agreeing with the Register and Receiver that the homestead entry which was made on March 3, 1902, was void, the respondent took no action whatever under such notification. He signified by his attitude of silence that he would uncomplainingly acquiesce in "cancellation" of the entry. He did nothing whatever to oppose "cancellation." Apparently he was willing that "cancellation" should be ordered and expected that it would be ordered. But the General Land Office did not order "cancellation" of the entry. That it should have taken some action that would have cleared its records and those of the local office of the inadventently allowed and void entry is perfectly apparent.

And solely because the General Land Office failed to take action clearing its records of the void entry, such entry was still of record on January 28, 1905, when the petitioner here (as he says at p. 4 of his petition) "filed a contest upon the sole and only ground that Dickson had not cultivated the land and had abandoned the same." A contest is a proceeding in rem—a proceeding against an entry—and has as its objective an order of cancellation of the entry because of a default on the part of the entryman

thereunder. There can be no default under a void entry, for an entry that is a nullity does not impose any legal requirement or obligation. Moreover, a person who has been authoritatively notified that his homestead entry will "doubtless" be adjudged a void entry and apparently agrees that the entry should be so adjudged, is not very likely to reside upon and cultivate the land embraced in the void entry. To do so would be to establish residence and to cultivate without any protection whatever under any lawful filing or claim.

After decision by the Register and Receiver in the contest proceeding (the decision being that the charges of non-residence and non-cultivation under the void entry had been sustained), the respondent filed a motion for rehearing contending that his entry was a nullity—was void on its face—and, therefore, that the petitioner could obtain no right whatever by a contest against it. Such motion was denied by the Register and Receiver. The respondent then appealed to the General Land Office and there made the same contention. He appealed to the Secretary of the Interior and made the same contention before that officer. But both the Commissioner and the Secretary held the contention to be meritless.

At pp. 27 and 28 of the petition it is said:

> "That is was not until July, 1906, that plaintiff asserted the invalidity of his entry No. 1185, when it became apparent that the Department would cancel said entry."

The aforesaid statement might create a false impression if the court should be without knowledge of the fact that the invalidity of the entry was urged upon the Register and Receiver in the contest proceeding previous to notice of that proceeding by the Commissioner of the General Land Office and the Secretary of the Interior. The Supreme Court of Oklahoma found (p. 33 of the petition):

"But it appears that early in the contest proceeding, plaintiff was asserting that his entry of March, 1902, was void."

It was in July, 1906, that the respondent (then qualified by reason of the provisions of the statute of 1902 to make a second homestead entry), applied to enter the land as a homestead. And, as found by the Supreme Court of Oklahoma, "plaintiff (respondent) occupied the land under his claim (his July, 1906 application) until the year 1917", that being the year in which certificate of final entry issued to the petitioner under the entry he made in the exercise of his alleged preference right as a successful contestant of a void entry.

The application for second entry which the respondent filed in July, 1906, was rejected by the land department upon the stated ground that the void entry which was made in 1902 was operative and effective to segregate the land from the unappropriated public domain and, therefore, that until an order of "cancellation" thereof had been entered the land described therein was not available for entry under any law. But notwithstanding said judgment by the land department, the respondent remained in occupancy of the land under the July, 1906, application for entry.

On August 5, 1910, the land department, it having theretofore rejected the respondent's application for second homestead entry which he filed in July, 1906, allowed petitioner to make a homestead entry under which a certificate of final entry issued on July 19, 1917, and patent issued on April 13, 1918. It was to obtain a decree that petitioner was a trustee of the title for the respondent that the latter instituted this litigation on July 19, 1917, date of issue of the certificate of final entry to the petitioner.

From the foregoing recital of the facts it is evident that the petitioner sought a preference right of entry under the second section of the act of May 14, 1880 (Chap. 89, 21 Stat. 140), through contest against an entry which was void on

its face, and that the respondent applied for entry upon the sound basis that the void entry of 1902 was inoperative and ineffective, per se, to remove the land from the class of unappropriated, vacant public land open to homestead entry and settlement. The petitioner claimed under a preference right as a contestant; a right which cannot accrue until after "cancellation" of the entry contested. His alleged right, therefore, accrued in July, 1910, when the void entry was "canceled." The respondent claimed under both an application to enter which he filed in July, 1906, and a settlement upon the land which, as the Supreme Court of Oklahoma found, was continued until 1917. Hence the respondent's right as an applicant and actual settler accrued four years before accrual of the alleged right of the petitioner as a successful contestant. From which it is manifest that seniority of claim has always been with the respondent.

ARGUMENT

I. The Petitioners' Contention That the Second Homestead Entry Statute of 1902, Supra, Was Confirmatory and Curative of Void Entries Made Before Its Enactment.

The land department has never decided that the act of May 22, 1902, supra, was retrospective in operation and confirmatory and curative with respect to entries allowed prior to that date and void on their face. Said act is entitled "An Act To Allow The Commutation of and Second Homestead Entries In Certain Cases." Its provisions, so far as material here, are these:

> "Sec. 2. That any person who, prior to the passage of an Act entitled 'An Act providing for free homesteads on the public lands for actual and bona fide settlers, and reserving the public lands for that purpose,' "approved May seventeenth, nineteen hundred, having made a homestead entry and perfected the same and acquired title to the land by final entry by having paid

> the price provided in the law opening the land to settlement, and who would have been entitled to the provisions of the Act before cited had final entry not been made prior to the passage of said Act, may make another homestead entry of not exceeding one hundred and sixty acres of any of the public lands in any State or Territory subject to homestead entry:"

It is obvious that the aforesaid provisions of law do not expressly or impliedly refer to void entries. They simply remove a disqualification to make entry. They permit in the future what was forbidden by law in the past. It is fundamental and elementary that a statute is not to be construed retrospectively, unless no other meaning can be given it, or unless the express or necessarily implied intention of the legislature cannot be otherwise satisfied.

But the petitioner insists that the land department has construed the act of 1902 as confirmatory and curative. The cases he cites in an attempt to justify such insistence do not either justify or excuse it. They fail utterly to show that the land department ever declared the act of 1902 to be confirmatory and curative. All three of them were decided previous to enactment of the statute of 1902. In John J. Stewart, (9 L. D., 543), Stewart procured a homestead entry on November 19, 1872, upon a false representation, to wit, that he had never perfected or abandoned a previous homestead entry. As a matter of fact he had abandoned a homestead entry which he made on December 5, 1868. Hence the entry of November 19, 1872, was not void on its face, but voidable for fraud. Moreover he had resided upon and cultivated the land embraced in such voidable entry. In the Stewart case the department had under consideration the second section of the act of March 2, 1889 (Chap. 381, 25 Stat. 854), but did not decide that the said act was confirmatory and curative of Stewart's voidable entry. What was decided was that "under the circumstances of this case" the Stewart entry of Novem-

ber 19, 1872, should not be distrubed. It should not be disturbed because Stewart was residing upon the land covered thereby and that to cancel the entry would in no wise affect Stewart's right immediately to make a new entry thereof under the provisions of the second entry act of 1889. Therefore it would have been a vain and idle thing to have canceled the Stewart entry of November 19, 1872, "under the circumstances of this case."

In George W. Blackwell (11 L. D., 384), Blackwell submitted a final proof under a homestead entry which he had made after "he had previously filed a soldiers declaratory statement on another tract of land." Such proof was rejected by the General Land Office on February 8, 1889, because the filing of the declaratory statement had exhausted Blackwell's right to make entry and, therefore, had disqualified him to make another entry. Without construing the act of March 3, 1889, supra, as confirmatory or curative of void or voidable entries made theretofore, the department, because of the right of second entry conferred by that act and of Blackwell's proof of residence and cultivation under his voidable homestead entry, refused to disturb the entry. To have canceled it would have been idle as Blackwell's residence upon the land and the act of 1889 enabled him immediately to re-enter the land.

In Smith et al., vs. Taylor (23 L. D., 440) the latter had made a homestead entry on April 30, 1889. This entry was not void on its face. It was, however, junior and inferior in right to the right of another and, therefore, was voidable for that reason. It was held for cancellation on February 24, 1893. However, it was not actually canceled until November 22, 1893. The question in Smith vs. Taylor was not whether any act of Congress was confirmatory or curative. It was whether the existence of such voidable—not void—entry on September 16, 1893, disqualified Taylor to make a valid homestead settlement upon and an entry of other lands on that date. The Department held that

the evidence showed that Taylor had in fact abandoned all claim under the voidable—not void—entry of April 30, 1889, before September 16, 1893; that even if the mere irregularity in allowing him to make the second entry before cancellation of the first one was sufficient to require cancellation of the second entry, yet the cancellation "would be without prejudice to his right to make again entry of the same tract, he being the senior settler thereon and his priority of settlement alone giving him priority of right to entry." Therefore, as the department said, "cancellation under these conditions would be a vain act."

But even if it could be shown that the land department had declared the act of 1902 to be confirmatory and curative, the error inhering in such a construction of the statute would be too palpable to require argument in demonstration of it.

II. The Petitioners Say That "The Primary Point for This Court to Determine is the Interpretation of Its Own Opinion" in Prosser v. Finn, 208 U. S., 67.

The opinion in Prosser v Finn, supra, contains nothing that is obscure or ambiguous. Its meaning is express, plain, unmistakable. There an employe of the General Land Office, although disqualified by express law (Revised Statutes, Section 452) to become interested in any of the public lands, made a timber culture entry. After making such entry the employe resigned from the service of the General Land Office. This court decided that the Land Department was right in treating the timber culture entry as invalid even after the person who made it had retired from employment by said office. The following is quoted from the opinion:

> "It may be well to add that the plaintiff's continuing in possession after he ceased to be special agent was not equivalent to a new entry. His rights must be de-

termined by the validity of the original entry at the time it was made."

What this court said in Prosser v Finn, supra, was followed and applied by the two courts below in deciding between the petitioners and the respondent. Those two courts said that the law in effect on March 3, 1902, forbade a second entry by the respondent; that the act of 1902, which removed respondent's disqualification to make second homestead entry, did not affect in the slightest the character in law of the entry by him which was inadvertently allowed when he was disqualified to make such entry; and that said act did not relieve those courts from the duty of deciding, as was decided in Prosser v Finn, to wit, that the validity of an entry must be determined as of the time when it was made.

Petitioner does not desire an interpretation of Prosser v Finn. He desires to have this court overrule Prosser v Finn.

To overrule Prosser v Finn, supra, would require that the court also overrule Waskey v Hammer (223 U. S., 85) and Ewert v. Bluejacket (259 U. S., 129). Waskey v Hammer presented the question whether a mining location was void because made by a United States Deputy Mineral Surveyor in contravention of the provisions of the Revised Statutes, Section 452, prohibiting employes of the General Land Office from "becoming interested in the purchase of any of the public lands." This court stated that its duty in said case was to consider "whether such a surveyor is within the prohibition" * * * "and, if so, whether that prohibition made the readjusted location void, or only voidable at the instance of the Government." This court cited approvingly Prosser v Finn and decided (a) that the prohibition included such a surveyor, (b) that an act done in disregard of the prohibition was within "the general rule of law" * * * "that an act done in violation of a statutory prohibition is void and confers no right upon the

wrong doer," and (c) therefore, "that the readjusted location was void."

Ewert v Bluejacket, supra, involved a purchase of Quapaw Indian land by a special assistant to the Attorney General of the United States assigned to duty in connection with allotments to the Quapaws. The question there was whether the deed such assistant received under his purchase was void. After discussing Revised Statutes, Section 2078, which provides that "no person employed in Indian affairs shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States," and citing Prosser v Finn and Waskey v Hammer, this court decided that "the purchase by Ewert being prohibited by the statute was void."

There is no principle of public land jurisprudence more familiar to the public than "the long and well established rule that the validity of an entry is to be determined by the facts existing at the date thereof." Franceway vs Griffiths (11 L. D., 315).

Equally deep rooted in that jurisprudence is the other principle, to wit, that "the qualifications requisite on the part of a homesteader must exist at the date of entry." Brown vs Cagle, (30 L. D., 8) and Case vs Kupperschmidt (30 Ib. 9).

III. The Petitioners Seem to Contend That There is Inharmony in the Decisions in Holt vs. Murphy (207 U. S., 407) and Prosser vs. Finn (208 U. S. 67).

Holt vs Murphy was decided January 6, 1908. Prosser vs Finn was decided January 13, 1908. The entry of which the court took notice in Holt vs Murphy was neither void on its fact nor void by reason of any facts of which the land department had judicial notice. The question there was not whether a void entry was effective to segregate land from the public domain and remove it from the reach of a valid application for entry. The question there was

whether a person who had contested and secured the cancellation of an entry which was valid when made had been wrongfully deprived of an opportunity to exercise the preference right of entry which was earned by reason of the successful contest. If in Holt vs Murphy the court had discussed any question involving a void entry, it is not unlikely that the opinion in Prosser vs Finn, which in fact discussed a void entry and which was announced only seven days after announcement of the opinion in Holt vs Murphy, would have contained some reference to the latter case.

The petitioners cite Dillard vs. Hurd (46 L. D., 51) and other cases in the land department and seem to contend that the rulings therein are inharmonious with the opinion of this court in Prosser vs. Finn, supra. However, only a casual examination of the departmental decisions cited by the petitioners will suffice to be convincing that they were made with respect to entries which were entirely regular upon their face and, for that reason, entirely unlike the entry which respondent made on March 3, 1902, and which was void on its face.

IV. The Petitioner Acquired No Right Whatever Under His "Contest" Against the Void Entry.

Very early in the proceedings under his contest against the void entry, the petitioner here became apprized of the facts which demonstrated that such entry was a nullity. The Supreme Court of Oklahoma remarked that "the facts surrounding this matter were well known to all the parties involved and were apparent of record, of which record the defendant Lowe was bound to take notice." (P. 33 of petition.) Notwithstanding the petitioner's knowledge of such facts, the prosecution of his contest against the void entry was continued. Moreover, early in the proceeding under the contest, the petitioner here became apprized of the fact that in July, 1906, the respondent not only applied for an entry of the land that was described in the void

entry but had entered into occupancy of it under the second homestead entry act of 1902.

A contestant is an informer. He seeks a reward for bringing to the notice of the land department matters of fact which are not shown by the records of that department. The reward sought is the preference right of entry conferred by the second section of the act of May 14, 1880, supra, a right which accrues only after cancellation of an entry as a consequence of proceedings under a contest.

The information which the petitioner imparted to the land department under his contest against the void entry was not essential to a judgment of "cancellation" of that entry. Such entry should have been "canceled" without being contested, and would have been "canceled" without being contested if the land department had performed its duty with respect to it. But that department chose to "cancel" the entry upon proof adduced by the contestant that respondent had not done what he was without any obligation whatever to do, namely, reside upon and cultivate land described in a void homestead entry, rather than upon the basis of those facts with respect to the void entry which showed it to be void ab initio and of which that Department had judicial notice over a period that antedated the bringing of the contest.

An "entry" which is null and void on its face cannot be made the subject of a contest, for it is not an entry. An entry which is void on its face is a nullity, and an order of "cancellation" cannot be operative on a nullity. Hence the respondent here acquired nothing whatever by way of a right with respect to the land in suit here by virtue of anything done under his contest proceeding.

V. Void Entries, Per Se, Are Not a Bar to the Reception of Due Applications for Entry of the Lands Described Therein.

An entry that is invalid on its face, i. e. an entry the invalidity of which is apparent from the papers consti-

tuting it, or is fatally defective by reason of matters of fact within the judicial notice of the land department, is void, is a nullity. That a void entry upon the records of the land department is not a legal or otherwise sufficient basis for rejection of an application to enter the land described in such void entry, is a proposition which the land department has invariably sustained. Three of its frequently cited decisions, none of which has ever been overruled or modified, will be adverted to briefly.

In David P. Litz (3 L. D., 182) it was evident from the record of the land department that a timber culture entry by one Curtis was erroneously and inadvertently allowed contrary to the provision of the timber culture entry statute "that not more than one-quarter of any section shall be thus granted." While such entry was still of record the land described therein was applied for by Litz. Acting on Litz's application the Interior Department said:

> "An entry which is illegal and void has no legal effect, and although it may be erroneously allowed to find place upon the record, is not a valid appropriation of the land and will not exclude it from further appropriation or at least from incipient appropriation. *It is nominally, only, an appropriation, and not so in fact.* As held in Wilcox v Jackson (13 Peters, 498) land must be *'legally appropriated'* in order to its severance from the mass of public lands."

In Shurtleff v. Kelly, et al (4 L. D. 448), Shurtleff applied to make homestead entry of land embraced in a timber culture entry which the records of the land department showed was void. In sustaining Shurtleff's application the Secretary said:

> "I am of the opinion that the ruling of your office, that Shurtleff could derive no benefit from his said application during the existence of the said entry of Kelly, was erroneous. Said entry being a second timber culture entry in a section was, for that reason,

prima facie void. If void, it was no segregation or appropriation of the land embraced in it."

In Jeremiah H. Murphy (4 L. D. 467), the land department records showed that Murphy was allowed to make an entry at a time (February 6, 1884) when the land was not subject to entry. When it became subject to entry (May 20, 1884) Murphy filed a second application for entry which was rejected for the stated reason that the entry he made on February 6, 1884, "was intact on the records." The Secretary said:

> * * * "the entry of Murphy, of February 6, being erroneously allowed, was as you decided illegal and void ab initio. A void act is an absolute nullity, and has no force or effect whatever. Therefore Murphy's entry of February 6 was not a bar to his application of May 20, and it was not necessary that his first entry should be finally cancelled to authorize his second application. This principle is fully announced in the case of David Litz, (3 L. D., 181). The decision of your office is therefore reversed, and Murphy's application will be allowed."

VI. The Assertion of the Petitioners That the Rejection of Respondent's Application, Filed in July 1906, "Does Not Entitle Him to Maintain a Bill in Equity to Declare the Petitioners Trustees for His Benefit."

The above assertion appears at page 12 of the petition. Its unsoundness is evident from Ard v. Brandon (156 U. S., 537); Duluth & Iron Range R. R. Co. v. Roy (173 U. S., 590); Nilson v. N. P. Ry. Co. (188 U. S., 108); Oregon, et cet. R. R. v. United States (189 U. S., 103); Knepa v. Sands (194 U. S., 476), and many other cases. Some of the observations in Ard v. Brandon, supra, are so apt here that we will briefly refer to that case.

Ard applied for a homestead entry. His application was rejected upon the stated ground that the land was not open

to such entry. Subsequently the legal title to the land passed from the United States and became vested in Brandon, et al, who sued Ard for possession. This court decided for Ard, saying that the rejection of his application was "wrongful, and denied to defendant that homestead entry which under the law he was then entitled to" * * * "He did all that was in his power in the first instance to secure the land as his homestead. That he failed was not his fault; it came through the wrongful action of one of the officers of the government" * * * "But here a rightful application was wrongfully rejected. This was not a matter of advice but of decision."

In Gilbert v. Shearing (4 L. D., 463) the Interior Department said:

> "It has been repeatedly held by the Department and by the Supreme Court of the United States, that when an applicant to enter public land has done all that the law requires of him, his rights will not be lost by the failure or neglect of the district land officers to do their duty. Lytle v. Arkansas. (9 How., 333)."

CONCLUSION

Wherefore, the respondent prays that the said petition for a writ of certiorari be denied, with costs.

ALEXANDER J. DICKSON,
Respondent,
By PATRICK H. LOUGHRAN,
Attorney for Respondent.

Supreme Court of the United States.

October Term, 1926.

SUSAN LOWE, *Petitioner*,
v.
ALEXANDER J. DICKSON, *Respondent*. } No. 158.

On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

MOTION FOR A RULE ON THE PETITIONER TO SHOW CAUSE WHY THERE SHOULD NOT BE FURNISHED ADDITIONAL SECURITY UNDER THE SUPERSEDEAS BONDS HEREIN.

Alexander J. Dickson, by his attorney, hereby moves for a rule of this Honorable Court to the petitioner herein to show cause—

1st. Why there should not be furnished additional security under the supersedeas bond that was given to stay execution of the judgment of the District Court of Beaver County, State of Oklahoma, rendered June 26, 1922, pending a review of such judgment by the Supreme Court of the said State, and

2d. Why the bond that was given to stay the mandate of the Supreme Court of the State of Oklahoma, under the judgment of that court rendered December 9, 1924, in affirmance, in all things, of the aforesaid judgment of the District Court of Beaver County, Oklahoma,

should not be adjudged insufficient to obtain a review in this court of the judgment of the said State Supreme Court,

And in support of the motion it is respectfully shown:

That on the 14th day of July, 1922, the Clerk of the District Court of Beaver County, Oklahoma, approved a bond in supersedeas of execution of the judgment of that court, pending a review of such judgment by the Supreme Court of Oklahoma. (A certified copy of such bond is annexed to the original of this motion, as exhibit No. 1 thereto, and a print thereof appears in the appendix hereto.) On such bond Seward K. Lowe, deceased, and Susan Lowe were the principals, and George Heglin, O. M. Kirkhart and George Merett (sometimes spelled Merritt), the sureties. That such bond was in the sum of $2,500, and operated to stay execution under a judgment "for the sum of Seven Hundred Dollars ($700) and costs and requiring said defendants to execute to said plaintiff a good and sufficient deed of conveyance" of the land in suit.

That since execution of the aforesaid bond the said George Heglin and O. M. Kirkhart have become and are wholly insolvent; that the said George Merett (or Merritt) is not now the owner of any property, of any kind or sort, of the value of the amount of said bond. (See the affidavit of Alexander J. Dickson, respondent, alleging "that George Heglin and O. M. Kirkhart have become wholly insolvent," annexed to the original of this motion, as exhibit No. 2 thereto, a print thereof appearing in the appendix hereto. See also the certified copy, annexed to the original of this motion, of the return, *nulla bona*, by the Sheriff of Beaver County, Oklahoma, made April 13, 1925, under the writ of execution that issued out of the District Court of said County to satisfy a judgment against George Heglin

obtained in the said court on May 21, 1924, in P. A. Johnston, et al v. C. C. Cope, et al, No. 3227 on the docket of said court.)

That the said O. M. Kirkhart justified as a surety by representing that he was the owner of 160 acres of land in Harper County, Oklahoma, valued at $9,000. That, however, the said Kirkhart sold and conveyed such land on July 2, 1926; that said Kirkhart is not now the owner of any real property in said county and is not now assessed for either realty or personalty in said county. (See the aforesaid affidavit of the respondent. See also the certificates by the County Clerk and County Assessor of Harper County, Oklahoma, annexed to the original of this motion, as exhibits Nos. 3 and 4 thereto, a print of such certificates appearing in the appendix hereto.)

That the said Kirkhart is not an owner of any real property in the County of Beaver, State of Oklahoma; that his taxable property in said County on January 1, 1926, was personal property only, of an assessed value of $110. (See the certificate of the Deputy County Assessor of Beaver County, annexed to the original of this motion.)

That the said George Merett (or Merritt) justified as a surety by representing that he was the owner of 160 acres of land in Beaver County, Oklahoma, of the aggregate value of $6,000, subject to a mortgage for $1,500, and of a business house and lot in the town of Gate, Oklahoma, valued at $2,000; that, however, the present fair value of such realty does not exceed $3,800, and such value, less the amount of such mortgage, is less than the amount of the liability of said Merett (or Merritt) on the bond aforesaid. (See the aforesaid affidavit of the respondent.) That the said Merett (or Merritt) was married and the head of a family at

time of execution of the said bond. That, however, his wife did not join in the execution thereof and, therefore, the aforesaid 160 acres are subject to a claim to it as a homestead, which claim may be lawfully asserted at any time.

That after affirmance by the Supreme Court of Oklahoma, in all things, of the judgment of the District Court of Beaver County, the said Supreme Court passed an order (a certified copy thereof being annexed to the original of this motion, as exhibit No. 5 thereto, a print thereof appearing in the appendix hereto) "that plaintiff in error be required to give supersedeas bond in the sum of $2,000, pending appeal to the Supreme Court of the United States." That pursuant to the authority of such order, the Clerk of the District Court of Beaver County, Oklahoma, approved a supersedeas bond (a certified copy thereof being annexed to the original of this motion, as exhibit No. 6 thereto, a print thereof appearing in the appendix hereto), on which bond Seward K. Lowe and Susan Lowe are the principals and E. D. Morris and T. H. Kirkpatrick are the sureties. That such bond is in the sum of $2,000, and was "conditioned that Seward K. Lowe and Susan Lowe will, during the time that the defendant in error is kept out of the possession of said property by virtue of the order of the Supreme Court of Oklahoma, denying the mandate, pay the value of the use and occupation of the property from the date of this undertaking until the delivery of possession and all costs," etc.

That the bond last mentioned, as its express terms denote, does not afford any security whatever to the respondent for any liability of the petitioners to the respondent that accrued at any time previous to June 23, 1925, on which date the State Supreme Court stayed its mandate upon condition that a supersedeas bond be

furnished. That, therefore, and because the sureties on the bond first mentioned herein, viz., the bond that stayed execution under the judgment rendered by the District Court of Beaver County, are insolvent, respondent is without that security for recovery pursuant to the judgment of the District Court of Beaver County to which he is entitled, and which the petitioner is required by law to furnish as a condition precedent to further prosecution of the writ of certiorari in this Honorable Court.

Wherefore, the respondent prays that this Honorable Court (a) will issue its rule upon the petitioner as moved for herein, and (b) that it will enter an order to its Clerk not to calendar this cause for argument or hearing, if at all, until after judgment rendered under the return to such rule.

Respectfully submitted:

ALEXANDER J. DICKSON.
By PATRICK H. LOUGHRAN,
Attorney for Alexander J. Dickson.

To Samuel Herrick, Esq.,
Attorney for the petitioners,
Washington, D. C.

You are notified hereby that on Monday, the 13th day of December, 1926, the foregoing motion will be presented to the Court.

PATRICK H. LOUGHRAN,
Attorney for Respondent.

Service of copy hereof, and of copies of all accompanying papers, is acknowledged this 26th day of November, 1926, at Washington, D. C.

SAMUEL HERRICK,
Attorney for Petitioner.

APPENDIX.

Exhibit No. 1.

IN THE DISTRICT COURT OF BEAVER COUNTY, STATE OF OKLAHOMA.

Alexander J. Dickson, *Plaintiff*,
vs.
Seward K. Lowe and Susan Lowe, *Defendants.* } No. 1991.

Supersedeas Bond.

Know All Men by These Presents:

That Seward K. Lowe and Susan Lowe, obligors and George Heglin, O. M. Kirkhart and George Merett, as sureties are held and firmly bound unto Alexander J. Dickson, plaintiff in the above entitled cause in the sum of Twenty Five Hundred Dollars ($2500.00) for the payment of which well and truly to be made we and each of us do hereby jointly and severally bind ourselves, our successors and assigns.

Dated this 14 day of July, 1922.

The conditions of the above and foregoing obligation is such that whereas in said court on the 26th day of June, 1922, judgment was rendered in favor of said obligee, plaintiff in said cause and against these obligors, Seward K. Lowe and Susan Lowe, defendants in said cause, for the sum of Seven Hundred Dollars ($700.00) and costs and requiring said defendants to execute to said plaintiff a good and sufficient deed of conveyance as in said judgment provided.

And whereas said defendants have taken an appeal from said judgment to the Supreme Court of the State of Oklahoma.

Now therefore if the said principal obligors herein

shall pay to the said obligee the condemnation money and costs and otherwise comply with the judgment of said court in case the judgment of said court shall be adjudged against them or affirmed in whole or in part then this obligation shall be void; otherwise to remain in full force and effect.

SEWARD K. LOW
SUSAN LOW
Principals,
GEORGE HEGLIN
O. M. KIRKHART
GEORGE MERETT
Sureties.

I hereby approve the above Bond, this 14th day of July, 1922.

JESSIE KEITH STEWART,
Court Clerk.
By JESSIE MAY FICKEL, *Deputy.*

Endorsed on back:

#1991
Alexander J. Dickson Plaintiff vs. *Seward K. Low and Susan Low Defendants.*

SUPERSEDEAS BOND

Filed this 14 day of July 1922 Jessie Keith Stewart, Court Clerk.
By Jessie Mae Fickel, *Deputy.*

O. C. Wybrat and C. W. Herod Attys. for Defendants Woodward, Oklahoma.

Recorded at Book 4 Page 573–4–5

CERTIFICATE.

STATE OF OKLAHOMA, } ss.
County of Beaver, }

I, Anna Hughes, the duly elected, qualified and acting Court Clerk, within and for said County and State, do

hereby certify that the within and foregoing is a full, true and complete copy of the Supersedeas Bond and Justification of Sureties as the same remains on file and of record in my office at Beaver, Oklahoma.

In witness whereof I have hereunto set my hand and seal, this 15th day of November, 1926.

ANNA HUGHES,
Court Clerk.

(SEAL) By *Deputy.*

EXHIBIT No. 2.

IN THE SUPREME COURT OF THE UNITED STATES

No. 158, October Term, 1926.

SEWARD K. LOWE AND SUSAN LOWE, *Petitioners,*
vs.
ALEXANDER J. DICKSON, *Respondent.* } No.

AFFIDAVIT OF RESPONDENT ON MOTION FOR ADDITIONAL BOND.

STATE OF OKLAHOMA, } *ss:*
County of Beaver, }

Alexander J. Dickson, of lawful age, being first duly sworn upon his oath, states that he is the Respondent in the above entitled cause. That the above entitled cause was tried in the District Court of Beaver County, Oklahoma, on the 26th day of June, 1922, and judgment rendered in favor of the Respondent and against Seward K. Lowe and Susan Lowe, Petitioners.

That on the 14th day of July, 1922, Petitioners filed their Supersedeas Bond with the Court Clerk of Beaver County, Oklahoma in the penal sum of $2,500.00, signed by Seward K. Lowe and Susan Lowe as principals, and George Heglin, O. M. Kirkhart and George Merritt as sureties.

That the said Supersedeas Bond was duly approved by the Court Clerk of Beaver County, Oklahoma, and execution stayed on said judgment while said cause was pending in the Supreme Court of the State of Oklahoma.

Affiant further states that since the approval of said bond that George Heglin and O. M. Kirkhart have become wholly insolvent.

Affiant further states that in a cause pending in the District Court of Beaver County, Oklahoma, wherein

P. A. Johnson, Roy Sappington, J. L. Vance, A. J. Dickson and F. R. Shauner are Plaintiffs and Clifton C. Cope, George Zirkle, George Heglin, H. O. Hennicke and H. S. Mathers were Defendants.

That judgment was rendered against said Defendants, including said George Heglin, in the sum of $3,898.17, and that afterwards execution was duly issued to the Sheriff of Beaver County on said judgment, and that said execution was duly returned "No Property Found."

Affiant further states that he was present in the court room and heard the sworn testimony of George Heglin in a proceeding to discover assets upon which execution could be levied, and that the said George Heglin testified under oath, that he was wholly insolvent and that he had no property subject to execution.

That the shorthand reporter who took down said testimony resided at Alva, Oklahoma, at that time, and this affiant is informed that this said shorthand reporter has removed from Alva, and that he does not know the present address of said reporter, and that he could not procure a copy of the testimony of the said George Heglin in said proceeding.

Affiant further states that O. M. Kirkhart, another surety on the said supersedeas bond, listed One Hundred and Sixty Acres of land in Section 34, Township 28, Range 26, W. I. M. Harper County, Oklahoma, and valued the same at $9,000.00, with an indebtedness against the same for $2,000.00.

Affiant states that he is acquainted with said land and that the same is not worth at the present time to exceed $3,000.00 and that he is informed by the County Clerk of Harper County, Oklahoma, that the said land is mortgaged for the sum of $6,600.00, much more than the said property would sell for under execution.

That the other surety on the said supersedeas bond, George Merritt, lists as his sole property upon said bond, One Hundred Sixty Acres of Land in Section 28, Township 5, Range 28, E. C. M. Beaver County, Oklahoma, valued at $6,000.00 and a business house and lot in Gate, Oklahoma, valued at $2,000.00, with a mort-

gage on the One Hundred Sixty Acres of land above referred to of $1,500.00.

Affiant further states that he is well acquainted with the value of land in that neighborhood, having lived about three and one half miles from said land for a number of years and that the value of said land is not to exceed $3,000.00, and that the value of the town property in Gate, Oklahoma, listed for $2,000.00 is not to exceed $800.00. That the property owned and listed by the said George Merritt, with the indebtedness deducted from the same is not to exceed $2,300.00.

Affiant further states that at the time that said supersedeas bond was approved real estate values in Oklahoma had been inflated to double their former value, and double their present value, and that not one half of the land in western Oklahoma would sell under execution for as much as it is mortgaged for.

Affiant further states that no other supersedeas bond was filed to stay an execution of the judgment of the District Court of Beaver County, Oklahoma, pending the decision of the Supreme Court of the State of Oklahoma, except the bond above referred to.

ALEXANDER J. DICKSON,
Affiant.

Subscribed and sworn to before me this 17th day of November, 1926.

H. N. LAWSON,
Notary Public.

(SEAL)

My Commission expires September 4th, 1928.

EXHIBIT No. 3.

STATE OF OKLAHOMA, *County of Harper,* } ss:

AFFIDAVIT

Virgil C. Dicksinson, being first duly sworn on oath says: That he is the duly elected, qualified and acting County Clerk of Harper County, State of Oklahoma, and as such County Clerk has the custody of the records in the office of the County Clerk of said County.

Affiant further states that the records do not show any land or real property in the name of O. M. Kirkhart.

Affiant further states that the records of this office show that the said O. M. Kirkhart was the owner of the NE¼ of Sec. 34, Twp 28 N. R. 26 W. I. M. and that on the 2 day of July, 1926 the said O. M. Kirkhart conveyed said described land to A. L. Kirkhart and now the said A. L. Kirkhart is the record owner of said described land, and that the incumbrance and indebtedness against said described land amount to the sum of $6600.00.

VIRGIL C. DICKINSON,
County Clerk of Harper County, Oklahoma.

Subscribed and sworn to before me this 19 day of November 1926.

B. F. WILLETT,
Notary Public.

(SEAL)

My commission expires January 30, 1929.

EXHIBIT No. 4

STATE OF OKLAHOMA, } ss:
Harper County, }

AFFIDAVIT

I, Tom Ricker, being first duly sworn on oath, say: That I am the duly elected, qualified and acting County Assessor of Harper County, Oklahoma, and have the custody and control of the records containing the assessment of the real and personal property, subject to assessment and taxation located and situated in Harper County, Oklahoma.

That the records in my office do not show any property, either personal or real assessed against O. M. Kirkhart or listed by him for taxation.

TOM RICKER,
County Assessor of Harper County, Oklahoma.

Subscribed and sworn to before me this 19 day of November, 1926.

B. F. WILLETT,
Notary Public.

(SEAL)

My commission expires January 30, 1929.

EXHIBIT NO. 5

Filed in the Supreme Court of Oklahoma, June 23, 1925.

WILLIAM M. FRANKLIN,
Clerk.

SUPREME COURT, JUNE TERM, 1925, JUNE 23D, 1925

14001 *S. K. Lowe, et al.* vs. *A. J. Dickson.*

And now on this day it is ordered by the court that plaintiff in error be required to give supersedeas bond in the sum of $2,000.00, pending appeal to Supreme Court of the United States. Said bond to be given within 10 days and to be approved by the Court Clerk of Beaver County.

I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the above and foregoing is a full, true and complete copy of the order of said Court in the above matter, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court of Oklahoma City, this 13th day November, 1926.

WILLIAM M. FRANKLIN,
Clerk.

(SEAL)

By ALAN ALEXANDER,
Deputy.

EXHIBIT 6.

Filed in Supreme Court of Oklahoma, June 29, 1925.
WILLIAM M. FRANKLIN,
Clerk.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA.

SEWARD K. LOW AND SUSAN LOW,
Plaintiffs in Error,
vs.
ALEXANDER J. DICKSON,
Defendant in Error.
No. 14,001.

BOND.

That whereas, The Supreme Court of the State of Oklahoma made an order holding the mandate in the above cause preparatory to taking the case to the Supreme Court of the United States, the cause having been affirmed by the Supreme Court of Oklahoma.

It appearing therefore that Seward K. Lowe and Susan are in possession of the property and that an application has been made by the defendant in error in the Supreme Court, requesting that the plaintiffs in error be required to execute a bond in the sum of Two Thousand ($2,000.00) Dollars as conditioned by law, for the protection of the rents and profits on the property pending the proceedings and during such time as the order of the Supreme Court will stay the mandate and prevent the execution of the judgment.

We, therefore, Seward K. Lowe and Susan Lowe, as principals, and E. D. Morris and T. H. Kirkpatrick, _____, _____, and _____ as sureties, acknowledge ourselves firmly bound unto Alexander J. Dickson in the penal sum of Two Thousand Dollars, conditioned that Seward K. Lowe and Susan Lowe will, during the time that the defendant in error is kept out of the possession of said property by virtue of the order of the Supreme Court of Oklahoma, staying the mandate, pay

the value of the use and occupation of the property from the date of this undertaking until the delivery of possession and all costs and will not commit waste or suffer to be committed any waste thereon. Provided, the judgment of the Supreme Court of Oklahoma is affirmed by the Supreme Court of the United States. That in case the said judgment is reversed by the Supreme Court of the United States, this bond shall be void.

Executed this the 27th day of June, 1925.

SEWARD K. LOW,
SUSAN LOW,
Principals.
E. D. MORRIS,
T. H. KIRKPATRICK,
Sureties.

APPROVAL OF THE BOND

The undersigned Clerk of the District Court of Beaver County, Oklahoma, hereby approves the foregoing bond.

ANNA HUGHES,
Clerk of the Court.

[SEAL]

Filed in the Supreme Court of Oklahoma, June 29, 1925.

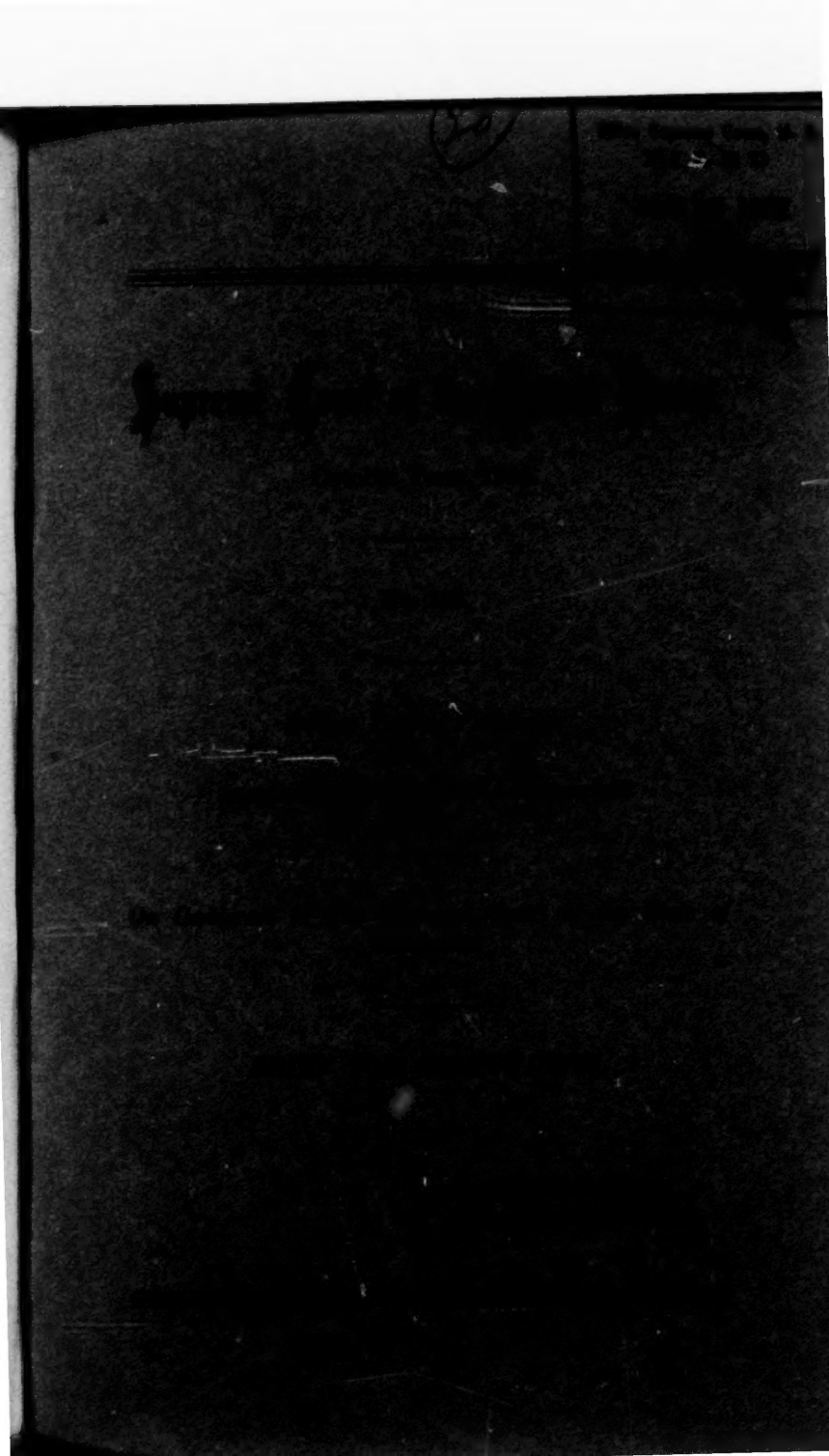
WILLIAM M. FRANKLIN,
Clerk.

I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the above and foregoing is a full, true and complete copy of the bond except the certificate of the sureties as to their debts and liabilities attached to the bond, as the same remains on file in my office.

In Witness Whereof, I hereunto set my hand and affix the Seal of said Court at Oklahoma City, this 13th day of November, 1926.

WILLIAM M. FRANKLIN,
Clerk.
By ALAN ALEXANDER,
Deputy.

[SEAL]



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Supreme Court of the United States.

October Term, 1926.

No. 158.

SUSAN LOWE, *Petitioner*,

v.

ALEXANDER J. DICKSON, *Respondent.*

On Certiorari to The Supreme Court of the State of Oklahoma.

BRIEF FOR RESPONDENT.

I.

WHAT PETITIONER SAYS SHE RELIES UPON IN THIS COURT.

At page 17 of the petitioner's brief it is stated that there is only one assignment of error "in this case," viz, that both courts below "erred in holding that the petition stated a cause of action." That statement hardly constitutes a specification of error. However, in support of it the petitioner sets forth what are described in the brief as three major propositions of law, viz,

1st. That the Interior Department "was right" in deciding that the act of May 22, 1902, c. 821, 32 Stat. 203, validated the homestead entry which was inadvertently permitted to be made by the respondent, on March 3, 1902 (petitioner's brief, p. 18).

2d. That the Interior Department "rightfully refused" to receive and allow the homestead application that was tendered by the respondent on July 2, 1906. (Petitioner's brief, p. 27.)

3d. That no rights "can be acquired" under an application to make a homestead entry, "where such application is rejected by the proper land office." (Petitioner's brief, p. 32.)

But it is in the "Conclusion" of petitioner's brief (p. 41 thereof) that there will be found the *only* proposition upon which she actually relies for reversal of the concurring judgments of the two courts below. The "Conclusion" is stated thus:

> "It will be observed from the pleading in this case that the only act ever done or performed by the respondent, Alexander J. Dickson, was to make and tender to the land office an application, which was rejected. It is true that he seeks to make proof of his occupation and cultivation in the court where he filed this suit. He also filed an affidavit as required. He didn't, however, make any act (sic) to comply with the Act of March 3, 1879, by publishing notice of his intention to prove up.
>
> "It seems to us that we can not be wrong in our contention that the mere tendering an application, which was rejected, could be made the basis of a suit in equity to establish title to public lands of the United States."

The extent to which, if at all, the petitioner urged upon either of the lower courts the contentions set out in the "Conclusion" is not evident from the contents of the record. However, there is an observation in the opinion of the State Supreme Court (R. 54) that may fairly be regarded as a notice by that court

of such, or a similar contention. The observation is this:

> "The adjudication of the questions involved is not a substitution of the court for the land office, but involves the question whether or not the Department erred in a pure matter of law."

Such brief notice of the unsound contention set out in the "Conclusion" of petitioner's brief, seems to be the only respect in which the State Supreme Court's opinion was not detailed and exhaus ··e in discussion of every contention on behalf of the petitioner which was, or which could be, made with any color of relevancy under the issues in the proceeding.

And that such notice was brief was doubtless due to the emphasis the petitioner placed on other and very different propositions in the courts below, and which are practically abandoned here. In those courts, as is manifest from the State Supreme Court's opinion, the petitioner relied exclusively upon this proposition, to wit, that the act of May 22, 1902, *supra*, was retroactive and validating legislation, i. e., that it rendered valid thereafter what was void theretofore, to wit, the homestead entry in the name of the respondent which the Register of the local land office, after inadvertently recording on March 3, 1902, discovered, on March 6, 1902, if not theretofore, had been erroneously allowed. (R. 11.)

That the aforesaid statute was not retroactive and was without validating effect, was the well reasoned conclusion of the Supreme Court of Oklahoma. After saying that such conclusion by the said court was erroneous, the petitioner (pp. 10 and 11 of petitioner's brief) added:

> "Still, even if we are in error, the following propositions are conclusive in favor of the petitioner."

And then follow propositions substantially those set forth in the "Conclusion" of the petitioner's brief. And that brief, we submit, as well as the character of the errors assigned, cause the petitioner's case in this Court to rest upon the following propositions stated in the "Conclusion" of her brief, to wit:

> "It seems to us that we can not be wrong in our contention that the mere tendering an application which was rejected, could be made the basis of a suit in equity to establish title to public lands of the United States."

II.

AN ERRONEOUS DENIAL OF AN APPLICATION TO ENTER PUBLIC LAND IS SUFFICIENT GROUND FOR A SUIT TO ADJUDGE THE HOLDER OF THE TITLE UNDER THE PATENT A TRUSTEE.

It had been decided by the Land Department that the respondent had no claim whatever to the land under the application which he filed on July 2, 1906. Therefore, if the respondent had attempted to make proof of residence upon and cultivation of the land before the Land Department he would have been told by the Department that he was without any claim to the land which he could prosecute and maintain by such proof. Because the respondent had not done something which he could not have done, to wit, submit proof to the Land Department of residence and cultivation of the land to the extent required by the

homestead laws, the petitioner asserts that the respondent has no standing in this or any other court. Some of the many decisions that demonstrate the unsoundness of that assertion are those to which we now refer, to wit:

In *Duluth and Iron Range Railroad Co.* v. *Roy*, 173 U. S. 587, 590, the same contention was made as is made here, viz, "that he [the homestead claimant whose application for entry was erroneously denied by the Land Department] has not made or has not offered to make final proof" before that Department of compliance with the residence and cultivation requirements of the homestead laws. This Court answered the contention thus:

> "This contention is attempted to be supported by the principles announced in *Bohall* v. *Dilla*, 114 U. S. 47; *Sparks* v. *Pierce*, 115 U. S. 408; *Lee* v. *Johnson*, 116 U. S. 48. The principles are that to enable one to attack a patent from the Government he must show that he himself was entitled to it. It is not sufficient for him to show that there may have been error in adjudging the title to the patentee. He must show that by the law properly administered the title should have been awarded to him.
>
> "We do not question these principles, but they only mean that the claimant against the patent must so far bring himself within the laws as to entitle him, if not obstructed or prevented, to complete his claim. It does not mean that at the moment of time the patent issued it should have been awarded to him. The acts performed by him may or may not have reached that completeness; may not have reached it, and yet justify relief, as in *Ard* v. *Brandon*, 156 U. S. 537, and in *Morrison* v. *Stalnaker*, 104 U. S. 213. And because of the well-established principle that where an individual in the prosecution of a right has done

that which the law requires him to do, and he has failed to attain his right by the misconduct or neglect of a public officer, the law will protect him. *Lytle* v. *Arkansas*, 9 How. 314.

"It would be arbitrary to apply the principle to some acts and not to other—might destroy it utterly to require the performance of all. But we are indisposed to extend the argument, because we regard *Ard* v. *Brandon* as decisive.

"In that case the claimant against the patent, being qualified and entitled, offered to make final proof, and from the denial of the offer prosecuted appeals successively to the Commissioner of the General Land Office and the Secretary of the Interior, and each decided against him. In this case defendant in error, also being qualified and entitled, offered to enter the land, which offer was denied, and against the claim of the State of Minnesota he instituted a contest, which was pending in the General Land Office, when the patent was issued by inadvertence and mistake, and his right thereby defeated. We do not regard this difference in the cases substantial."

In *Ard* v. *Brandon*, 156 U. S. 537, 544, an application to make homestead entry was erroneously rejected. The rejection, of course, precluded the possibility (as the rejection in this case precluded the possibility) of submitting final proof before the Land Department of compliance with the homestead laws. This Court said:

"But here a rightful application was wrongfully rejected. This was not a matter of advice but of decision. Doubtless the error could have been corrected by an appeal, and perhaps that would have been the better way; but when, instead of pursuing that remedy, he is persuaded by the local land officer that he can accomplish that which he desires in another way—a way that to him

> seems simpler and easier—it would be putting too much of rigor and technicality into a remedial and beneficial statute like the homestead law to hold that the equitable rights which he had acquired by his application were absolutely lost."

In *Svor* v. *Morris*, 227 U. S. 524, a settlement was made at a time (in 1888) when a defective indemnity selection of the land by a railway company was pending. The selection was finally rejected on October 23, 1891, and six days thereafter the company filed another indemnity selection of the same tract, which selection was approved on March 29, 1897, the approval and resultant certification operating to pass title to the company. Thereafter the settler sued to have the company's grantee decreed to be a trustee of the title. This Court concluded that such suit was meritorious and should be sustained, notwithstanding that the settler had never proved in a proceeding before the Land Department that he had resided upon and cultivated the land as required by the homestead laws.

Nelson v. *Northern Pacific Railway*, 188 U. S. 108, 124, was another instance of an erroneous rejection of an application to make homestead entry, this Court saying:

> * * * "he (the homestead applicant) attempted to enter it under the homestead law in the proper land office, but his claim was overruled upon the theory, unfounded in law, that the land was covered by the railroad grant."

See also *Weeks* v. *Bridgman*, 159 U. S. 541, 546, and *Northern Pacific Railway* v. *Trodick*, 221 Ibid. 208.

In *Gilbert* v. *Spearing* (4 L. D., 463) the Interior Department said:

"It has been repeatedly held by the Department and by the Supreme Court of the United States, that when an applicant to enter public land has done all that the law requires of him, his rights will not be lost by the failure or neglect of the district land officers to do their duty. *Lytle* v. *Arkansas* (9 How., 333)."

III.

THE ACT OF MAY 22, 1902, WAS NOT RETROACTIVE AND VALIDATING LEGISLATION.

Throughout the petitioner's brief are *suggestions* to this Court that its duty is to adjudge the act of May 22, 1902, to be confirmatory and validating legislation. But at no place in that brief are the provisions of the statute discussed. And that fact is doubtless due to the other fact, viz, that none of the terms of the statute can furnish even color of ground on which to rest a conclusion that the act was confirmatory and validating. Neither in its express terms nor by any of its implications is the statute curative legislation. Only by judicial additions to the language of the statute—only through judicial legislation—is it possible to make the statute operative and effective as confirmatory and validating legislation.

Section 2 of the act of May 22, 1902, c. 821, 32 Stat. 203, is the legislation material here. Its provisions are these:

"Sec. 2. That any person who, prior to the passage of an Act entitled 'An Act providing for free homesteads on the public lands for actual and bona fide settlers, and reserving the public lands for that purpose,' approved May seventeenth, nineteen hundred, having made a home-

stead entry and perfected the same and acquired title to the land by final entry by having paid the price provided in the law opening the land to settlement, and who would have been entitled to the provisions of the Act before cited had final entry not been made prior to the passage of said Act, may make another homestead entry of not exceeding one hundred and sixty acres of any of the public lands in any State or Territory subject to homestead entry: Provided, That any person desiring to make another entry under this Act will be required to make affidavit, to be transmitted with the other filing papers now required by law, giving the description of the tract formerly entered, date and number of entry, and name of the land office where made, or other sufficient data to admit of readily identifying it on the official records: And provided further, That said person has all the other proper qualifications of a homestead entryman: And provided also, That commutation under section twenty-three hundred and one of the Revised Statutes, or any amendment thereto, or any similar statute, shall not be permitted of an entry made under this Act, excepting where the final proof, submitted on the former entry hereinbefore described, shows a residence upon the land covered thereby for the full period of five years, or such term of residence thereon as added to any properly credited military or naval service shall equal such period of five years."

That there is nothing in the above language to sustain a contention that the statute validated homestead entries made previous to its date, is so plain that argument in support of it need not be made in this court. All that devolves upon us is to refer to the principles of statutory construction upon which we rest our positive assertion that there is not discoverable at any

place in the aforesaid legislation anything whatever to warrant the view that its necessary effect was to confirm, ratify, and validate the homestead entry which was inadvertently and erroneously made in the name of the respondent on the 3d of March, 1902.

It is axiomatic that no statute will be construed as retrospective except as to the extent that the statutory language shows the intention "in unequivocal terms." This court has said:

> "Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms." Twenty Per Cent Cases, 20 Wall. 179, 187, and cases cited in the foot-note.

And does not the foregoing state "the settled doctrine of this court"? This Court has said:

> "In *United States* v. *Heth*, 3 Cranch, 398, 413, this court said, that 'words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature can not be otherwise satisfied;' and such is the settled doctrine of this court. *Murray* v. *Gibson*, 15 How. 421, 423; *McEwen* v. *Den*, 24 How. 242, 244; *Harvey* v. *Tyler*, 2 Wall. 328, 347; *Sohn* v. *Waterson*, 17 Wall. 596, 599; Twenty Per Cent Cases, 20 Wall. 179, 187." *Chew Heong* v. *United States*, 112 U. S. 536, 559.

For a court to declare a statute retroactive, those terms of it showing its retroactivity must be "clear, strong and imperative." This Court has said:

"The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared. 1 Kent. 455; *Eidman* v. *Martinez*, 184 U. S. 578; *White* v. *United States*, 191 U. S. 545; *Gould* v. *Gould*, 245 U. S. 151; Story, Const., Sec. 1398. The comment of Story is, 'retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.'

* * * * * * *

"There is certainly in it no declaration of retroactivity, 'clear, strong and imperative,' which is the condition expressed in *United States* v. *Heth*, 3 Cranch, 398, 413; also *United States* v. *Burr*, 159 U. S. 78, 82–83." *Shwab* v. *Doyle*, 258 U. S. 529, 534, 535.

And on the basis of the authorities just cited, we submit that to construe the provisions of the act of May 22, 1902, as having retrospective effect would be to violate the fundamental precepts of statutory construction pronounced and constantly adhered to by this Court in a long line of decisions.

IV.

AS THE VOID ENTRY WAS NOT VALIDATED BY THE ACT OF 1902, THE LAND IN SUIT WAS SUBJECT TO THE APPLICATION FILED BY THE RESPONDENT IN JULY, 1906 AND TO THE SETTLEMENT HE MADE THEREON IN THAT MONTH.

Petitioner's husband prevailed in the Land Department because that Department "held that Dickson's entry was validated by the act of May 22, 1902"

(R. 40 and 41). *In so holding, the Department of the Interior admitted that such entry was invalid and void before May 22, 1902. That the Departmental decision was wrong—was without reason in any law—is, we think, beyond possibility of judicial doubt.*

And that being the respondent's position here—it being his contention that the entry was void and that it never was validated—there remain for discussion on his behalf but two other matters, viz, (a) the law with reference to which any question as to the validity of an entry should be determined, and (b) whether a void entry upon the records of the Land Department constitutes a legal or otherwise sufficient basis either for the rejection of an application to enter the land described in the void entry, or for a holding that a valid settlement may not be initiated and maintained upon the land during the time it is embraced in the void entry. For it is a fact of which sight should not be lost, that respondent not only applied for entry of the land in July, 1906, but also went into occupancy of it at that time and remained in occupancy of it continually for eleven years thereafter.

The Supreme Court of the State held, on the authority of *Prosser* v. *Finn*, 208 U. S. 67, that the respondent's entry was void. In that case this court had before it an entry of public land by an employee of the General Land Office. The question was whether the entry became valid by force of the employee's retirement from the service of the General Land Office. Answering that question in the negative, this Court said that the matter of the validity of the entry must be determined with reference to the facts and the applicable law obtaining when the entry was made; and if void then, it was void thereafter. That case, how-

ever, did not involve a question as to whether any subsequent enactment of Congress had a confirmatory or validating effect. But it did cause this court to conclude that if not validated by such legislation, an entry void when made is void ever after.

Respondent's inadvertently allowed entry was quite as emphatically forbidden by law as was the entry in *Prosser* v. *Finn, supra.* In both cases the entries were made by persons disqualified by the law to make the entries involved in the cases. *Waskey* v. *Hammer*, 223 U. S. 85, and *Ewert* v. *Bluejacket*, 259 U. S. 129, also involved public land filings forbidden by law. *Waskey* v. *Hammer* presented the question whether a mining location was void because made by a United States Deputy Mineral Surveyor in contravention of the provisions of the Revised Statutes, Section 452, prohibiting employees of the General Land Office from "becoming interested in the purchase of any of the public lands." This court stated that its duty in said case was to consider "whether such a surveyor is within the prohibition" * * * "and, if so, whether that prohibition made the readjusted location void, or only voidable at the instance of the Government." This court cited, approvingly, *Prosser* v. *Finn, supra*, and decided (a) that the prohibition included such a surveyor, (b) that an act done in disregard of the prohibition was within "the general rule of law" * * * "that *an act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer*," *and* (c) *therefore*, "*that the readjusted location was void.*" (Emphasis ours.)

Ewert v. *Bluejacket, supra*, involved a purchase of Quapaw Indian land by a special assistant to the Attorney General of the United States assigned to duty in connection with allotments to the Quapaws.

The question there was whether the deed such assistant received under his purchase was void. After discussing Revised Statutes, Section 2078, which provides that "no person employed in Indian affairs shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States," and citing *Prosser* v. *Finn*, and *Waskey* v. *Hammer*, this court decided that "*the purchase by Ewert being prohibited by the statute was void.*" (Emphasis ours.)

There is no principle of public land jurisprudence more familiar to the public than "the long and well-established rule that the validity of an entry is to be determined by the facts existing at the date thereof." *Franceway* v. *Griffiths* (11 L. D., 314, 315.)

Equally deep rooted in that jurisprudence is the other principle, to wit, that "the qualifications requisite on the part of a homesteader must exist at the date of entry." *Brown* v. *Cagle* (30 L. D., 8), and *Case* v. *Kupferschmidt* (30 Ib. 9).

Holt v. *Murphy*, 207 U. S. 407, was decided January 6, 1908. *Prosser* v. *Finn*, 208 U. S. 67, was decided January 13, 1908. The entry of which the court took notice in *Holt* v. *Murphy* was neither void on its face nor void by reason of any facts of which the land department had judicial notice. The question there was not whether a void entry was effective to segregate land from the public domain and remove it from the reach of a valid application for entry. The question there was whether a person who had contested and secured the cancellation of an entry which was valid when made, had been wrongfully deprived of an opportunity to exercise the preference right of entry which was earned by reason of the successful contest. If in *Holt* v. *Murphy* the court had discussed any question involving a void entry, it is not unlikely that the opinion in

Prosser v. *Finn*, which in fact discussed a void entry and which was announced only seven days after announcement of the opinion in *Holt* v. *Murphy*, would have contained some reference to the latter case.

The petitioner cites *Dillard* v. *Hurd* (46 L. D., 51) and other cases in the Land Department, and seems to contend that the rulings therein are inharmonious with the opinion of the Supreme Court of Oklahoma. However, only a casual examination of the departmental decisions cited by the petitioners will suffice to be convincing that they were made with respect to entries which were entirely regular upon their face and, for that reason, entirely unlike the entry which respondent made on March 3, 1902, *and which was void on its face.*

There being no doubt, we think, that the inadvertently allowed entry of the respondent was void when made and never was confirmed or validated by any legislation, we pass to the next question, viz: Did the Land Department err not only in rejecting the respondent's application for entry filed in July, 1906, but in ignoring and disregarding the settlement he made on the land in that month and maintained thereafter? His settlement could not, of course, be proved before the Department, as it had denied his application for entry. That it wrongfully denied him an entry, and assigned an untenable ground for its denial, to wit, that the void entry segregated the land, is evident from many of the Department's decisions. Three of them frequently cited and never overruled or modified, will be adverted to.

In David P. Litz (3 L. D., 181, 182) it was evident from the records of the land department that a timber culture entry by one Curtis was erroneously and inadvertently allowed, contrary to the provision of the

timber culture entry statute "that not more than one-quarter of any section shall be thus granted." While such entry was still of record the land described therein was applied for by Litz. Acting on Litz's application the Interior Department said:

> "An entry which is illegal and void has no legal effect, and although it may be erroneously allowed to find place upon the record, is not a valid appropriation of the land and will not exclude it from further appropriation or at least from incipient appropriation. It is nominally, only, an appropriation, and not so in fact. *As held in Wilcox* v. *Jackson* (*13 Peters, 498*) *land must be 'legally appropriated' in order to its severance from the mass of public lands.*" (Emphasis ours.)

In *Shurtleff* v. *Kelly, et al* (4 L. D. 448), Shurtleff applied to make homestead entry of land embraced in a timber culture entry which the records of the Land Department showed was void. In sustaining Shurtleff's application the Secretary said:

> "I am of the opinion that the ruling of your office, that Shurtleff could derive no benefit from his said application during the existence of the said entry of Kelly, was erroneous. *Said entry being a second timber culture entry in a section was, for that reason, prima facie void. If void, it was no segregation or appropriation of the land embraced in it.*" (Emphasis ours.)

In Jeremiah H. Murphy (4 L. D. 467, 468), the Land Department records showed that Murphy was allowed to make an entry at a time (February 6, 1884) when the land was not subject to entry. When it became subject to entry (May 20, 1884) Murphy filed a second application for entry which was rejected,

for the stated reason that the entry he made on February 6, 1884, "was intact on the records." The Secretary said:

> * * * "the entry of Murphy, of February 6, *being erroneously allowed, was as you decided illegal and void ab initio. A void act is an absolute nullity, and has no force or effect whatever.* Therefore Murphy's entry of February 6 was not a bar to his application of May 20, *and it was not necessary that his first entry should be finally cancelled to authorize his second application.* This principle is fully announced in the case of David Litz (3 L. D., 181). The decision of your office is therefore reversed, and Murphy's application will be allowed." (Emphasis ours.)

V.

RESPONDENT WAS IN ACTUAL OCCUPANCY, AS A QUALIFIED SETTLER UNDER THE HOMESTEAD LAWS, FROM 1906 TO 1917.

The Oklahoma Supreme Court found and concluded, as follows (R. 52):

> "We know of no way by which plaintiff may have estopped himself to set up the invalidity of his attempted entry of March 3, 1902, unless it be by some deceitful conduct or some misrepresentation that has misled the defendant to his disadvantage as to the facts. But it appears that early in the contest proceeding, plaintiff was asserting his right under his attempted entry of July 2d, 1906, and asserting that his entry of March, 1902, was void. This matter was decided against plaintiff upon appeal and decided upon the erroneous theory that his original void entry had been subsequently validated. *The facts surrounding this matter were well known to all of the parties involved and were apparent of record, of which record,*

> *the defendant, Lowe, was bound to take notice.* Again, it is urged, that plaintiff has been guilty of such laches as should bar this action. We are unable to so find. *Plaintiff occupied the land under his claim until the year 1917.* This action was begun on July 19, 1917; defendant received his final certificate on July 19, 1917. We are therefore of opinion that the original entry of March 3, 1902, was void, and following the law, as announced in *Prosser* v. *Finn, supra*, that this (fol. 284) void entry was not therefore validated by *the continued possession of the land thereunder after he had become qualified by law to make a valid entry*, and that the holding of the Department that such void entry was thereafter validated was error. It follows that in July, 1906, the land was open for entry." (Emphasis ours.)

Respondent's void entry of March 3, 1902, was "cancelled" by the Interior Department under petitioner's husband's "contest" on July 30, 1910. The land was not then unappropriated public land. As found by the lower court, it was then, and had been since 1906, in the actual occupancy of the respondent, who continued in occupation until 1917. Therefore, when petitioner's husband made homestead entry in 1910, he entered appropriated public land—appropriated by the respondent through his occupancy of it in reliance upon the validity of his application for entry, filed on July 2, 1906.

If the aforesaid application of July 2, 1906, was invalid, what caused it to be invalid? Certainly it was not invalid merely because filed during pendency of petitioner's husband's "contest." That "contest," as we contend, was a nullity. It was a nullity because, as we further contend, the entry against which it was directed was a nullity. In other words, as there was no

entry, there could not be a contest. And these contentions, if sound, render obviously sound the proposition that the land in suit was open and unappropriated public land when the respondent, *with notice to petitioner's husband of reliance by respondent upon the application he filed on July 2, 1906*, went into occupancy in 1906 and remained in occupancy until 1917.

When respondent was informed by counsel that the inadvertently allowed entry was void, he immediately made application for entry, doing so on July 2, 1906. That application was a disclaimer under the inadvertently allowed entry. It was notice to petitioner's husband and to the Land Department of a claim to the land by the respondent utterly inconsistent with any claim thereto under the inadvertently allowed entry. As found by the State Supreme Court: "The facts surrounding this matter were well known to all of the parties involved." *They were also well known to the Land Department before it rendered any decision in the "contest" proceeding against the void entry.* (R. 40 and 41.) And being well known to the said Department at that time, its duty with respect to them was evident, although not performed, viz, to declare the inadvertently allowed entry void. But instead of declaring it void, the Department "held that Dickson's entry was validated by the act of May 22, 1902." (R. 40 and 41.)

CONCLUSION.

SENIORITY OF VALID CLAIM AND RESULTANT PRIORITY OF RIGHT HAVE ALWAYS BEEN WITH THE RESPONDENT.

Very early in the proceedings under the "contest" against the void entry, the petitioner's husband be-

came apprized of the facts which demonstrated that such entry was a nullity. The Supreme Court of Oklahoma remarked that "the facts surrounding this matter were well known to all the parties involved and were apparent of record, of which record the defendant Lowe was bound to take notice." (R. 52.) Notwithstanding the petitioner's husband's knowledge of such facts, the prosecution of his "contest" against the void entry was continued. Moreover, early in the proceeding under the contest, the petitioner here became apprized of the fact that in July, 1906, the respondent not only applied for an entry of the land that was described in the void entry but had entered into occupancy of it under the second homestead entry act of 1902.

A contestant is an informer. He seeks a reward for bringing to the notice of the land department matters of fact which are not shown by the records of that department. The reward sought is the preference right of entry conferred by the second section of the act of May 14, 1880, c. 89, 21 Stat. 140, a right which accrues only after cancellation of an entry as a consequence of proceedings under a contest. The information which the petitioner imparted to the Land Department under his contest against the void entry was not essential to a judgment of "cancellation" of that entry. Such entry should have been "cancelled" without being contested, and would have been "cancelled" without being contested, if the Land Department had performed its duty with respect to it.

But that department chose to "cancel" the entry upon proof adduced by the contestant that respondent had not done what he was without any obligation whatever to do, namely, reside upon and cultivate land described in a void homestead entry, rather than upon the

basis of those facts (showing the entry to be void *ab initio*) of which the Interior Department had judicial notice through many years that antedated the bringing of the "contest."

The respondent applied for entry upon the sound basis that the void entry of 1902 was inoperative and ineffective to remove the land from the class of unappropriated, vacant public land open to homestead entry and settlement. The petitioner claimed under a preference right as a contestant, a right which can not accrue until after "cancellation" of the entry contested. His alleged right, therefore, accrued in July, 1910, when the void entry was "cancelled." *The respondent claimed under both an application to enter which he filed in July, 1906, and a settlement upon the land which, as the Supreme Court of Oklahoma found, was begun in 1906 and continued until 1917.*

Hence the respondent's right as an applicant and actual settler accrued four years before accrual of the alleged right of the petitioner as a successful contestant. From which it is manifest that seniority of claim, and resultant priority of right, have always been with the respondent.

Respectfully submitted,

PATRICK H. LOUGHRAN,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 158.—October Term, 1926.

Susan Lowe, Petitioner,
vs.
Alexander J. Dickson.

On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

[April 11, 1927.]

Mr. Justice Sutherland delivered the opinion of the Court.

Respondent obtained a decree in an Oklahoma state court adjudging that a certain tract of land, for which a United States patent had been issued to Seward K. Lowe, was held by Lowe in trust for respondent. This decree was affirmed by the state supreme court. 108 Okla. 241. The suit was brought against Seward K. Lowe and Susan Lowe, his wife. On October 4, 1926, the death of Seward K. Lowe was suggested, and Susan Lowe substituted as the sole party petitioner.

The pertinent facts are as follows: On May 22, 1894, respondent made homestead entry of 160 acres of land, and, after final proof and payment, received a patent from the government. On March 3, 1902, he made a second homestead entry of other land at the proper local land office. His affidavit accompanying the application contained the statement that he had not theretofore made an entry under the homestead laws except that he had filed upon certain described land and "paid out on it about three years ago." In making the second entry, respondent acted in good faith, believing at that time that his right to make it had been conferred by law. On March 6, 1902, the local land officer informed respondent that his second entry was erroneously allowed because, by his former entry, he had exhausted his homestead right; that the entry would undoubtedly be held for cancellation by the Commissioner of the General Land Office on that account; and that respondent could, if he wished, relinquish that entry and apply

for the return of his fees and commissions. Respondent took no action, and the entry, in fact, was not cancelled but was intact on and after May 22, 1902. On that date, an act of Congress, § 2, c. 821, 32 Stat. 203, was passed, the effect of which was to qualify respondent to make a second homestead entry. After the passage of that act, respondent continued to claim the land as a homestead.

On March 13, 1903, Seward K. Lowe filed a contest against the second entry on a charge of abandonment, but subsequently withdrew it and instituted a new contest, January 28, 1905, charging abandonment for a period of six months and failure to improve and cultivate. June 20, 1906, the local land office found for Lowe and recommended cancellation of respondent's entry. On July 2, following, respondent made another application to enter the land as a homestead, reciting the two former entries and asserting that the second one had been erroneously allowed. This third application was rejected by the local land office on the ground that it conflicted with the subsisting second entry. Appeals to the Department of the Interior followed, respondent contending that his second entry was a nullity and, consequently, not contestable, and that his third application should have been allowed under the decision in *Jeremiah H. Murphy*, 4 L. D. 467, holding that a subsisting void entry is no bar to a subsequent legal application by the same person. The department held that (1) the original invalidity of the second entry was immaterial, because respondent's continued assertion of right thereunder after the passage of the act of May 22, 1902, cured the entry and made it valid, citing prior decisions; (2) the entry having thus been validated, the rule in the *Murphy* case was not applicable; and (3) the second entry having become valid, respondent was bound to pursue it in compliance with law and could not defeat a contest by electing, after the contest was waged, to treat the entry as invalid. On the merits, the charge of failure to reside upon and cultivate the land was found proved, and the entry was cancelled on that ground. Lowe made homestead entry of the land, and in time received final certificate and patent.

The state supreme court declined to follow this holding of the department, saying that while it was supported by a number of prior departmental decisions, which were entitled to great weight and should not be overruled unless clearly erroneous, a controlling

conclusion to the contrary had been reached by this court in *Prosser* v. *Finn*, 208 U. S. 67.

The *Prosser* case involved the construction and application of § 452 Rev. Stats. — "The officers, clerks, and employés in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office." Prosser, a special agent of the General Land Office and held to be within the terms of the statute, made a timber culture entry of certain land and complied with the law in respect of cultivation and in other particulars. His entry was contested upon the ground, among others, that it was made in violation of § 452. The contest was sustained by the local land office, and its ruling affirmed by the department. Patent for the land was issued to Finn, and Prosser brought suit for a decree adjudging that the title was held for him in trust by Finn. The ruling of the department was attacked on the ground that long prior to the initiation of the contest, Prosser had ceased to have any connection whatever with the land department, and his entry, therefore, was validated by removal of the disability. This court held that the statute applied; that Prosser's entry was invalid; that his continuance in possession after ceasing to be special agent was not equivalent to a new entry; and that his rights were to be determined by the validity of the original entry at the time it was made.

Section 452 affects a class of persons having superior opportunities and power to perpetrate frauds and secure undue advantage over the general public in the acquisition of public lands. "The purpose of the prohibition is to guard against the temptations and partiality likely to attend efforts to acquire public lands, or interests therein, by persons so situated, and thereby to prevent abuse and inspire confidence in the administration of the public-land laws." *Waskey* v. *Hammer*, 223 U. S. 85, 93. The provision is to be so applied and enforced as to effectuate the purpose. And it is evident, that to deny an officer, clerk or employé of the land office the right to make an entry while occupying that relationship, but to validate such an entry upon his retirement from the service, would thwart the statutory policy, since the result would be to allow the entryman still to reap the fruit of his undue ad-

vantage, superior knowledge and opportunities, and, perhaps, of his fraud, which it is the aim of the statute to forestall.

But the restrictions of the homestead law which precluded the acquisition of a second homestead rest upon other and different considerations. The purpose of such restrictions was to limit the bounty of the United States; but when that bounty has been extended to include an additional homestead right, the policy of the law is not infringed by allowing an entry, honestly made, though unauthorized under the old law, to stand as though made under the new law; provided, of course, other rights have not intervened. In that case, to compel a cancellation of the unauthorized entry and the formal making of a new entry of the same land is merely to require unnecessary circuity of action to accomplish a permissible result. The land department for many years has uniformly held that the old entry may stand, *John J. Stewart,* 9 L. D. 543; *George W. Blackwell,* 11 L. D. 384; *Smith et al.* v. *Taylor,* 23 L. D. 440, and its decision should not be disturbed except for cogent reasons, *McLaren* v. *Fleischer,* 256 U. S. 477, 481; *United States* v. *Pugh,* 99 U. S. 265, 269, which here do not exist. On the contrary, as we have indicated, the reasons convincingly are the other way. The *Prosser* case would have fallen within a like principle if, while Prosser was in possession of the land and resting upon his entry, the law itself had been so altered as to remove the disqualification imposed by § 452. Such a change in the law would have manifested a change of policy, with which, as in the present case, validation of the unauthorized entry, no adverse claims intervening, would not have conflicted.

It is well settled that, while § 2320 Rev. Stats. provides explicitly that "no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located," a discovery after location will validate the location if no adverse rights have intervened. To require a new location under these circumstances "would be a useless and idle ceremony, which the law does not require." *Mining Company* v. *Tunnel Company,* 196 U. S. 337, 345, 348-352; *Union Oil Co.* v. *Smith,* 249 U. S. 337, 347; *Cole* v. *Ralph,* 252 U. S. 286, 296. So, where an alien has made a public land entry, his subsequent naturalization or declaration of intention to become a citizen will, in the absence of adverse claims, relate back and confirm the entry. *Bogan* v. *Edinburgh American Land Mortg. Co.,* 63 Fed. 192, 198. In *Manuel* v. *Wulff,*

152 U. S. 505, 511, the same rule was applied in the case of a purchase of a mining claim by an alien who became a citizen pending adverse proceedings. And the rule is the same where a homestead entry has been made by a minor who comes of age prior to the inception of an adverse claim. *Huff* v. *Geis*, 71 Colo. 7; *Dillard* v. *Hurd*, 46 L. D. 51. We are unable to perceive any substantial ground for denying the applicability of the logic of these decisions to the present case.

It follows, as the land department held, that Lowe's contest was filed against a validated and subsisting entry which had had the effect of segregating the land from the public domain and thereby precluding the subsequent entry attempted to be made by Dickson. *Holt* v. *Murphy*, 207 U. S. 407, 412. And since Dickson's right to relief rests entirely upon his contention to the contrary, which the state court upheld, the decree of that court must be

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.